

DEPARTMENT OF THE INTERIOR

FRANKLIN K. LANE, SECRETARY

BUREAU OF MINES

VAN, H. MANNING, DIRECTOR

ABSTRACTS OF CURRENT DECISIONS

ON

MINES AND MINING

REPORTED FROM

SEPTEMBER TO DECEMBER, 1917

BY

J. W. THOMPSON



WASHINGTON
GOVERNMENT PRINTING OFFICE
1918

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ABSTRACT OF CURRENT DECISIONS ON MINES AND MINING, SEPTEMBER TO DECEMBER, 1917.

By J. W. THOMPSON.

MINERALS AND MINERAL LANDS.

MINERALS.

COAL AS MINERAL.

Coal is recognized as a mineral.

United States *v.* Beaman, 242 Federal, 876, p. 878.

ORE CONCENTRATION PROCESS — PATENT — OIL FLOTATION PROCESS.

The invention of the patent issued to Sullman, Picard & Ballot November 6, 1906 (United States Letters Patent No. 835120), is based upon the discovery of an wholly unexplained phenomenon arising from the agitation of ore pulp containing oil and air in certain proportions. This was a discovery in an art in which it was well known that the elements of oil, air, and agitation possessed certain characteristics and produced certain results. As early as 1860 a British patent first suggested the use of oil in water concentration of ores by pointing out the affinity which oils have for metallic substances in preference to gangue. Subsequently many patentees employed the known affinity of oil for metal in ore concentration processes by using oil in proportions varying from 2 per cent to 300 per cent of the ore and recovering the oil-coated metal particles by causing them to rise to the top or sink to the bottom of the pulp. In these processes the agitation was either gentle or thorough but never great, and though always employed to produce thorough oiling of the metal it was used in different degrees for the sole purpose of causing the metal particles to rise or sink. In the prior art the oil was used for its known selective affinity for metal, agitation was employed to mix the oil with the metal, and air was introduced to supplement the buoyancy of oil in raising oil-coated metal particles to the surface. To this extent had the art of oil flotation advanced when the patentee entered it, having reached the commercial stage in only two processes, representing respectively metal-flotation and metal-sinking

processes, and having reached the stage of success in none. In the line of experiments by the patentee when the proportion of oil to ore was reduced to 1.5 per cent a "float" appeared; at 1.04 per cent still more "float" appeared; at 0.32 per cent the "float" again vastly increased; at 0.1 per cent the "float" again vastly increased. It thus developed that in using oil at 0.1 per cent or even at 0.05 per cent of the ore and after violently agitating the pulp from 2½ to 10 minutes, there arose to the surface when the pulp was brought to rest, a thick froth or foam of oil-coated air bubbles carrying oil-coated metal particles to the extent of about 90 per cent of the metal content, the foam being sufficiently stable to permit removal and metal recoveries. This was a new result based upon phenomenon then unknown and still unexplained and constituted discovery and promised a change in the art of oil flotation from laboratory experiments and mill failures to commercial success. The patent referred to covering the points mentioned has been sustained by the District and the Circuit Courts of Appeals and by the Supreme Court.

Miami Copper Co. v. Mineral Separation, 244 Federal, 752, pp. 754-757.

ORE CONCENTRATION PROCESS—OIL FLOTATION—INFRINGEMENT.

The Miami Copper Co. in its process of concentrating ores by the oil flotation process used three distinct processes that were either the processes included and covered by the Sullman, Picard & Ballot patent or their fair equivalent and which were clearly an infringement of the patent, and the company can not escape liability for such infringement by taking an additional step, although such additional step if taken alone would not constitute an infringement of the Sullman, Picard & Ballot patent.

Miami Copper Co. v. Mineral Separation, 244 Federal, 752, p. 768.

ORE CONCENTRATION PROCESS—VALIDITY OF GREENWAY PATENT.

The patent issued to H. Greenway, June 9, 1914 (Letters Patent No. 1999699), is valid. The process disclosed in this patent was a substantial departure from processes of the prior art. The heating of water is a matter of large moment and the use of acids is a matter of constant and considerable expense. By wholly dispensing with both by the use of a minute quantity of hydroxy compounds, the patentee has disclosed an original and novel plan which has broadened and made more simple the agitation process of air flotation. The novelty and inventive character of Greenway's discovery is patentable.

Miami Copper Co. v. Mineral Separation, 244 Federal, 752, p. 774.

MINERAL LANDS.**OPTION TO PURCHASE — NOTICE — OPTION ABSOLUTE.**

A lease of a mine and mining property contained an option by which the lessee might purchase the property during the term. The lease provided that notice of nonpurchase could be given any time between July 6, 1915, and May 3, 1916. The lease was analogous to a sale on approval, requiring notice of disapproval by a time limited, and on failure to give the notice the sale became absolute. By the terms of the lease a written notice dated May 11, 1916, was too late, and the lessee's option agreement became absolute and binding.

Mackey Wall Plaster Co. v. United States Gypsum Co., 244 Federal, 275, p. 278.

RIGHT OF STATE TO MINERAL LANDS.

The act of July 10, 1890 (26 Stat., 222, p. 224), admitting Wyoming to the Union, expressly declares that all mineral lands shall be exempted from the grants made by the act. Mineral lands did not in any event pass to the State under either the act of July 10, 1890, or February 28, 1891 (26 Stat., 796), the latter providing that indemnity lands shall be selected from any unappropriated surveyed public lands not mineral in character.

State of Wyoming, In re, 46 Land Decisions, 34, p. 36.

HOMESTEAD ENTRY — BURDEN OF PROOF.

A homestead entry was allowed upon proper showing and satisfactory evidence of the nonmineral character of the land. Before patent a protest was filed by a mineral claimant, claiming the land under a mining location and asserting that the homestead entry was not made in good faith, and that the land is more valuable for mining than agricultural purposes. On a hearing on such protest the burden of proof is on the protestant to prove the mineral character of the land and that the land is in fact more valuable for mining than for agricultural purposes.

Gonzales v. Stewart, 46 Land Decisions, 85, p. 87.

SALE AND CONVEYANCE.**MINERAL CHARACTER — RETURN OF SURVEYOR — PRESUMPTION.**

The return of the surveyor general in connection with the survey of public land to the effect that the land is mineral or nonmineral is sufficient evidence of its character to cast the burden of proving the contrary upon the party alleging that the land is of a different character; but the opportunities of surveyors for determining the

character of land are so uncertain that this presumption is only a slight one and may be readily overcome by evidence of a higher character.

Gonzales v. Stewart, 46 Land Decisions, 85, p. 87.

SUBSEQUENT DISCOVERY OF MINERALS.

When a public land claimant has done all that the law and authoritative regulations prescribe and has obtained an equitable title to and a vested interest in the land, any subsequent discovery or disclosure of minerals does not affect or impair his rights.

State of Wyoming, In re, 46 Land Decisions, 34, p. 36.

JURISDICTION OF LAND DEPARTMENT—QUESTIONS DETERMINED.

The Land Department is charged with the duty of determining the character of land to be selected by a State, and also it must determine the date subsequent to which the mineral question is foreclosed.

State of Wyoming, In re, 46 Land Decisions, 34, p. 36.

SELECTION BY STATE—DISCOVERY OF MINERALS.

A State has no vested right or interest in an indemnity school-land selection until approval and a discovery of mineral prior to approval defeats an indemnity selection. Prior to the approval of an indemnity selection the land included therein, if mineral in character, is open to exploration and purchase under the mining laws of the United States.

State of Wyoming, In re, 46 Land Decisions, 34, p. 38.

SELECTION OF NONMINERAL LANDS BY RAILROAD COMPANY.

The act of March 2, 1899 (30 Stat., 993), authorized a railroad company to select an equal quantity of nonmineral public lands, classified as such, in lieu of lands owned within a national park by it and relinquished to the United States. The lieu selection must be land that is not of known mineral character at the date of selection and it must have been returned as nonmineral by the official surveyor at the time of the survey. Lieu lands can not be selected under this statute of which the surveyor said in his return "mining operations are now being carried on to a great extent. Mineral indications are found in nearly all parts of the township." This return does not make specific reference to the particular tract and is possibly equivocal and uncertain, but it can not be said that either through omission or by direct reference it classified the selected tract as nonmineral.

Northern Pacific R. Co., In re, 46 Land Decisions, 1.

MINERAL LANDS NOT ACQUIRED AS HOMESTEAD—AVOIDANCE OF PATENT.

Lands known at the time of their purchase from the United States to be valuable for minerals and coal are not subject to acquisition under the homestead laws, but a patent under the homestead laws for land as agricultural may not be avoided in a suit in equity on the ground that it was mineral land unless conditions were such at the time of the entry and purchase of it as to make the fact plain at that time to the entryman and others familiar with the land and its condition, that it did in fact contain mineral deposits of such quality and value and in such quantity as to render the necessary expenditures to develop, extract, and sell them profitable. If at the time of entry and patent the land was not known to be valuable for its mineral deposits, the subsequent discovery, development, exploration, or mining on the land or on lands in its vicinity will not be sufficient to justify an avoidance of the patent.

United States v. Beaman, 242 Federal, 876, p. 878.

INDIAN LANDS—ALIENATION—CONSTRUCTION OF STATUTE.

The purpose of the act of Congress of April 18, 1912 (37 Stats. at Large, 86), was not to impose restrictions upon alienation of Osage lands but to authorize the conveyance of such of the lands to which restrictions had attached, by reason of their allotment, to living members who had subsequently died, leaving surviving them Indian heirs, members of the tribe to whom certificates of competency were issued.

Fowler v. Rogers (Oklahoma), 167 Pacific, 635, p. 636.

INDIAN LANDS—RESTRICTION ON ALIENATION.

The act of Congress of June 28, 1906 (34 Stats. at Large, 539), placed no restriction on alienation by the heirs, after the death of the ancestor, an Osage Indian, of inherited lands allotted and deeded to him in his lifetime, save only the mineral interest therein reserved to the tribe, individual disposition of which is expressly inhibited.

Fowler v. Rogers (Oklahoma), 167 Pacific, 635, p. 636.

TRANSFER TO AND BY INCOMPETENT PERSON—TITLE.

A person may be disqualified from holding title to coal lands himself, but he is a proper conduit through whom to pass title from one who has it to one who may legally take it. A corporation merely, as a corporate entity, is not disqualified from acquiring or holding coal lands.

Ketchum Coal Co. v. Pleasant Valley Coal Co. (Utah), 168 Pacific, 86, p. 91.

CONVEYANCE IN TRUST—LIFE ESTATE—INHERITANCE.

A husband and wife owning royalties under and by virtue of certain coal leases conveyed the same to a trustee in trust to receive all moneys due under such leases and to pay to the husband a certain stated sum per year in quarterly installments and to pay a certain stated part of the remainder to the wife during the life of the husband, and after his death to pay her such amount as she would be entitled to receive under the intestate laws of Pennsylvania, and to pay the balance in equal shares to the three named children of the husband and wife. The intention of the husband and wife as expressed in the deed was to secure the estate to their three children in equal shares and to give up their former rights in the leases and the coal and to stipulate for certain yearly cash payments to be made to them during their lives. The conveyance was absolute during the term of the trust which was coterminous with the life of the survivor, and on the death of the wife, who survived the husband, the trust ended and the estate passed to the three children in equal shares.

Miners' Bank of Wilkes-Barre, In re (Pennsylvania), 101 Atlantic, 934.

SURFACE AND MINERALS—OWNERSHIP AND SEVERANCE.

SEPARATION OF MINERALS AND SURFACE—ADVERSE POSSESSION.

In order to make a holding adverse to one who has reserved all mineral rights and the right to enter thereon for the purpose of extracting the minerals, there must have been some denial of his right or some assertion of a claim incident with his right which does not necessarily appear where a person uses the land merely for agricultural purposes, as such use is entirely consistent with the right of another to prospect for oil and gas under the surface. The possession of the surface by the owner for the purpose of cultivation gives him no possession of the minerals or oil and gas under the surface and does not exclude the owner of the minerals from the right to go upon the land and prospect for the same.

Barker v. Campbell-Ratcliffe Land Co. (Oklahoma), 167 Pacific, 468.

ADVERSE POSSESSION OF MINERALS.

In all freehold lands an adverse claim to the mineral must be distinctly established against the owner of the surface. This result may be shown by the production of documents showing that the minerals have been conveyed, excepted, or reserved so as to have become vested in the claimant. But the fact is not established where the claimant was in neither actual or constructive possession of the surface, as he can not under such circumstances be held to have been in the constructive possession of the mineral.

Griffin v. Delaware & Hudson Co. (Pennsylvania), 101 Atlantic, 750, p. 752.

CONVEYANCE OF LAND—RESERVATION OF MINERALS VOID.

A deed to certain mineral lands recited that the grantors "do hereby grant, bargain, sell, and convey unto James J. Lewis and unto his heirs and assigns forever the following described lands." After describing the land the deed further recited: "To have and hold the same unto the said James J. Lewis and unto his heirs and assigns forever with all appurtenances thereto belonging with the privilege of working the same, and we except the manganese and lithograph claim hereby covenanted with the said James J. Lewis that we will forever warrant and defend title to said lands against all lawful claim whatever." The reservation is in ambiguous language, but even if it were more definite it is irreconcilably repugnant to the granting clause of the deed and is therefore void.

Cole v. Collie (Arkansas), 198 Southwestern, 710.

RESERVATION OF MINERALS—OIL AND GAS.

A grant or reservation in general terms of all the minerals in a tract of land prima facie includes the oil and gas as well as the solid minerals, though such a grant or reservation is sometimes susceptible of an interpretation that excludes oil and gas.

Columbia Gas & Electric Co. v. Moore (West Virginia), 93 Southeastern, 1051, p. 1052.

RESERVATION OF MINERALS—ESTATE BY ENTIRETY.

A deed conveying certain land contained a reservation "saving and reserving, however, unto the said parties of the first part, and to their heirs and assignees forever, all ores and minerals on or beneath the surface of said land together with the right to enter upon said lands and to explore the same therefor and to mine the same without let or hindrance." The legal effect of such a clause in a deed is to separate the surface and mineral estates and to pass only the surface estate. Where the wife has no interest other than an inchoate right of dower in the lands conveyed by deed in which she joins with her husband, the presumption is that she joined merely for the purpose of subjecting her dower, and the intention and effect of a clause reserving the minerals in a deed executed by a husband and wife is not to create in the thing excepted any new right in the husband or wife but to preserve in each the same rights each had therein before the execution of the deed. A reservation of minerals in a deed conveying the land of the husband executed by the husband and wife, does not create an estate by entireties in the minerals so reserved.

Demerse v. Mitchell (Michigan), 164 Northwestern, 97, p. 98.

See *Demerse v. Mitchell* (Michigan), 154 Northwestern, 22.

RESERVATION OF MINERALS—EFFECT.

Where the owner of land conveys the surface and reserves the minerals, the estates are as separate and as distinct as if the grantor had conveyed a one-half undivided interest. The mineral interest retained necessarily detracts from the value of the land to the grantee and to the extent to which it so detracts it is an interest in the land belonging to the grantor.

Northwestern Improvement Co. v. Oliver County (North Dakota), 164 *Northwestern*, 315, p. 318.

ENJOINING MINERAL OPERATION—PLEADING.

A bill for an injunction to prevent mining on a tract of land alleged a common source of title in the plaintiff's lessor and the defendant, and a severance of such title as to the minerals. The bill alleged that a former owner having the complete title to the land executed a deed conveying the minerals therein to a certain named person as grantee and retained the surface. It is also alleged that by subsequent conveyances the title to the minerals became vested in the lessor of the plaintiff and the title to the surface of the land was vested in the defendant. These allegations, admitted by demurrer, exclude all questions of conflict of boundaries and adverse title. As the defendant obtained title to the surface in 1914 it was impossible for him to have acquired title to the gas as distinct from the surface by adverse possession. When the gas or minerals were severed in title from the surface the possession of the surface by the grantees of the same was not possession of the minerals or gas beneath the surface.

Columbia Gas & Electric Co. v. Moore (West Virginia), 93 *Southeastern*, 1051, p. 1052.

SEPARATION OF MINERAL AND SURFACE ESTATES—VALUATION FOR TAXES.

The sale by a landowner of the minerals or coal underlying the land necessarily reduces the valuation of the land and the owner of the surface is entitled to have the reduced valuation shown and properly made for the purpose of taxation.

Board, etc. Sullivan County v. Riggs (Indiana Appeals), 117 *Northeastern*, 214, p. 215.

See *Riggs v. Board, etc., Sullivan County*, 181 *Indiana*, 172; 103 *Northeastern*, 1075.

COAL AND COAL LANDS.

ACTION TO AVOID PATENT—PROOF INSUFFICIENT.

An action was instituted by the United States Government to avoid and vacate a patent for agricultural lands which subsequently proved to contain coal, on the ground that the patent issued under

the homestead law was procured by fraud. The evidence introduced on the part of the Government is not sufficient to maintain an action and to vacate the patent where "it goes no further than to raise an uncertainty and doubt in the mind, whether or not any one with all the knowledge of those familiar with the land, with the lands in the vicinity and with the conditions and circumstances surrounding these lands then had, would have known that the land here under consideration was valuable for its deposits of coal."

United States v. Beaman, 242 Federal, 876, p. 879.

SELECTION OF LIEU LANDS—CONCLUSIVENESS OF LAND DEPARTMENT'S FINDINGS.

A locator of land in a forest reservation relinquished the tract to the Government pursuant to the statute and selected in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract relinquished. The statute limits the lieu selection to vacant, surveyed, and nonmineral public lands subject to homestead entries. Notice was given to the locator that upon his lieu selection coal crops and coal measures were found of purchasable quantity and workable quality. Upon denial of these facts and a hearing, the register and receiver recommended that the lieu selection be relieved from suspension and approved for patent. On appeal to the Land Department the Commissioner of the General Land Office confirmed the findings and conclusions of the register and receiver. No appeal being taken, patents were finally issued and delivered to the locator. The question whether the land in controversy was or was not coal land was a question of fact, and the determination of that question by the Land Department is final and conclusive on the courts. This rule must apply in the instant case, though the notice of the hearing was defective, where it appears that there was an actual contest and the proof was not limited to the date of the lieu selection, but was in fact extended to the date of the actual hearing before the register and receiver.

United States v. Whitted, 245 Federal, 629.

PATENT UNDER HOMESTEAD LAW—BONA FIDE PURCHASER.

Title to lands containing a valuable deposit of coal was obtained in 1902 and 1903 by the patentee under the homestead law. A coal company that purchased the land four years later, paying a valuable consideration therefor, in reliance upon the patent and without notice of any fraud in its procurement, has an equity far superior to that of the Government where for two years and more, with knowledge that the land was valuable for coal, and before the purchase by the coal company, it had instituted no suit and made no effort to invalidate the patent.

United States v. Beaman, 242 Federal, 876, p. 880.

LAND ENTERED BY ONE FOR ANOTHER—TITLE AND CONVEYANCE.

The United States statutes expressly forbid one person for himself or any company or corporation to procure directly or indirectly another person to settle upon any lands open to settlement with intent thereafter to acquire title thereto: and any title thus acquired shall be void. But section 5025 (5 U. S. Comp. Stats., 1916), has no application to a case where a patent for land was lawfully acquired and conveyance made to a person disqualified from holding it.

Ketchum Coal Co. v. Pleasant Valley Coal Co. (Utah), 168 Pacific, 86, p. 91.

CONVEYANCE—SUBSEQUENT TITLE INURES TO GRANTEE.

The statute of Utah provides that if any person, purporting to convey land in fee simple absolute, who shall not at the time have the legal estate to such land, but shall thereafter acquire the same, the legal estate so acquired shall immediately pass to the grantee, and the conveyance shall be as valid as if the legal estate had been in the grantor at the time of the conveyance. (Compiled Laws of Utah, 1907, sec. 1979.) This act applies to a person who conveyed coal lands before he had made application to purchase and before he had a right to and had acquired the title thereto from the Government and when he subsequently acquired the title from the Government it passed to his grantee.

Ketchum Coal Co. v. Pleasant Valley Coal Co. (Utah), 168 Pacific, 86, p. 91.

TITLE—CONSTRUCTIVE POSSESSION—ADVERSE POSSESSION.

In a suit in ejectment and containing also a bill to remove a cloud by which it was sought to establish the title to coal underlying a certain tract of land the complainant claimed title to the whole of the tract. The defendant owned another tract and had and held possession for over 30 years of a strip which theoretically was a part of the tract claimed by the plaintiff by constructive possession. Such claimed constructive possession of the tract or strip by the plaintiff did not create a conflicting possession and thereby defeat the defendant's title under the statute of Tennessee (Shannon's Code, sec. 4456), under which adverse possession under a deed for more than seven years gives an indefeasible title.

Glen Mary Coal & Coke Co. v. Wolfe, 243 Federal, 131, p. 135.

REMOVAL OF MINERALS—INJUNCTION—ESTOPPEL.

A trustee of an insane cotenant of coal lands can not be permitted to enjoin the lessee, one of the cotenants, from mining and removing the coal and recover from such cotenant his part of the value of the coal so removed on the ground that the insane cotenant had not

- joined in the lease, where it appeared that the trustee of the insane cotenant had received and accepted his full share of rents and royalties and had used it for the benefit of his insane ward.

Wilmer v. Philadelphia Reading Coal & Iron Co. (Maryland), 101 Atlantic, 538, p. 540.

OWNERSHIP OF COAL — RIGHT TO MAINTAIN ACTION FOR TRESPASS.

A person who has never been in the actual possession of the surface of land and who has had neither actual nor constructive possession of the coal underlying such land can not maintain an action for trespass against one who mined and removed the coal.

Griffin v. Delaware & Hudson Co. (Pennsylvania), 101 Atlantic, 750, p. 752.

TIMBER FOR MINING PURPOSES — CONTRACT OF SALE — TITLE — RESCIS- SION.

A mining company by deed sold all the standing timber upon its coal lands, the same to be cut and removed from the lands on or before a stated date. By a subsequent agreement between the parties the timber was estimated to contain 8,000,000 feet log scale; but if by actual measurement there was found to be a less quantity a deduction should be made in the price at a stated price per thousand feet. Prior to the date of the sale of the timber the mining company executed a mortgage on all of its mining property to secure certain bonds. This mortgage included also all the timber necessary for the development, working, and mining of the coal and the preparation of the same for market and the removal of the same. The purchaser of the timber can not rescind the contract of purchase either on the ground of false representation as to the quantity of the timber, or on the ground that the title to the timber was not then in the coal company because of the mortgage previously executed.

Hitt Lumber Co. v. Cullman Coal & Coke Co. (Alabama), 76 Southern, 347.

SALE OF COAL — PURCHASER FOR VALUE.

The fact that a purchaser paid only \$125 for the coal and minerals underlying a tract of 1,000 acres of land is not sufficient of itself to prove that a purchaser was not a purchaser for value, simply because the land titles in the vicinity were uncertain, where it appeared that the land owner himself had paid but \$125 for the land with the coal included. A purchaser to entitle him to the possession and the protection of a purchaser for value is not required to pay a consideration that is either fair or adequate but simply that the purchase is for value.

Steinman v. Clinchfield Coal Corp. (Virginia), 93 Southeastern, 684, p. 690.

BREACH OF CONTRACT FOR SALE OF COAL—MEASURE OF DAMAGES.

A coal mining company brought suit against a purchasing company to recover a balance due on account for coal sold and delivered to the purchasing company. The purchasing company by way of counterclaim alleged that the mining company had failed to deliver to it coal pursuant to its contract, and that because of such failure it was compelled to purchase coal elsewhere to fill contracts with its customers, by reason of which it sustained damages in a large sum. The coal purchased by the purchasing company was for the purpose of resale on the market of the city of Louisville, a considerable distance from the mines of the coal mining company, which fact was known to the mining company. In such case on the failure of the coal mining company to furnish coal under its contract, the damages to which the purchasing company was entitled was the difference between the contract price at the time and place of delivery, according to the contract, and the market price at that time, at such place, to be credited by the cost of transportation from the mines of the mining company to the city of Louisville; and the damages to which the purchasing company was entitled for the failure on the part of the mining company to deliver the coal, to the extent that the purchasing company, after reasonably diligent efforts to purchase other coal of similar kind and character to supply the place of that which it failed to receive from the mining company and was not able to buy other coal instead, was the profits which the purchasing company would have realized by a resale of such coal, if at the time of the making of the contract the resale of the coal and the profits to be made therefrom were within the contemplation of the parties, and if these were the inducements for the purchase of the coal.

Log Mountain Coal Co. v. White Oak Coal Co. (Kentucky), 197 *Southwestern*, 659, p. 661.

CONTRACT FOR SALE OF COAL—SPECIFIC PERFORMANCE.

By the terms of a contract between a coal mining company and a purchasing company, the mining company agreed to sell to the purchasing company all its output or straight mine-run coal up to 100 tons daily average for each working day of 20 days per month for one year, loaded on freight cars, for a price of \$1.50 per ton loaded on the cars. The coal was to be merchantable and of standard quality and preparation. The contract clearly contemplates a continued daily operation of the mine, requiring special knowledge, skill, and direction running over a period of 12 months. It not only requires the delivery of the output of the mine up to 100 tons daily average for 20 working days in a month, but that such coal shall be of a certain specified quality. The contract stipulates for a succession of acts and requires protracted supervision and oversight, with the exercise

of such knowledge or judgment in such oversight, and such contracts are not as a rule specifically enforced.

Black Diamond Coal Min. Co. v. Jones Coal Co. (Alabama), 76 Southern, 42, p. 43.

OIL AND OIL LANDS.

OIL AND GAS AS MINERALS.

Oil and gas are minerals within the meaning of a reservation in a deed "of all mineral rights" upon the land described in the deed.

Barker v. Campbell-Ratliffe Land Co. (Oklahoma), 167 Pacific, 468.

CLASSIFICATION AND SELECTION—BURDEN OF PROOF.

Where land has been withdrawn or classified upon data indicating that it is mineral in character and the Government continues to assert that it does in fact contain valuable mineral deposits, an applicant who seeks to have such land declared to be nonmineral must sustain the burden of proof at a hearing had for the determination of that question. Where land was entered before the date of the withdrawal act of June 25, 1910 (36 Stat., 847), and where there is no evidence that at the date of final proof and payment the land was mineral in character and where it has been reported by Government officials as being nonmineral, the entryman will be entitled to patent, although the land is within the boundaries specified in a withdrawal order.

Hildreth, In re 46 Land Decisions, 17.

Rankine, In re 46 Land Decisions, 46.

WASTE—INJUNCTION.

The abstraction of oil from lands by one joint owner to the exclusion of his cotenant is waste, and may be enjoined by the coowner so excluded.

Paxton v. Benedum-Trees Oil Co. (West Virginia), 94 Southeastern, 472, p. 474.

RESERVATION OF MINERAL—CONSTRUCTION OF DEED.

A deed for certain described land with full covenants of warranty contained a reservation as follows: "It is hereby agreed that the parties of the first part reserve all mineral rights upon the above-described lands, and the right to enter thereon and to use so much of the surface as may be reasonable for the purpose of extracting the mineral therefrom at any time is reserved from this grant." The exception or reservation of all mineral rights is not repugnant to the covenants of title. A lessee of the mineral rights under this reservation has the right, as against a grantee of the original grantor in whose favor the reservation was made, to enter upon the land and explore and develop it for minerals.

Barker v. Campbell-Ratliffe Land Co. (Oklahoma), 167 Pacific, 468.

AGRICULTURAL ENTRY WITHIN PETROLEUM RESERVE—RIGHTS OF ENTRYMAN.

Lands entered as agricultural were prior to final proof included within the boundaries of a petroleum reserve. In such case the entryman may apply for a restricted patent, or he may apply for a classification of the land as nonmineral, or he may apply for a hearing, or he may suffer cancellation of his entry. A classification would involve the determination of the present character of the land. An application for a hearing would involve the question as to the known oil or nonoil character of the land at the date of the submission of final proof. The withdrawal is *prima facie* evidence that the land was known to be oil in character at the time of filing final proof. In such case the burden of proof is upon the entryman to establish that the land was not known to be oil in character at the time of final proof.

Rankine, *In re 46 Land Decisions*, 46, p. 50.

ADVERSE POSSESSION—CLAIM OF RIGHT.

Adverse possession of oil and gas lands within the statute of Texas is an actual and visible appropriation of the land commenced and continued under a claim of right inconsistent with and hostile to the claim of another. The "claim of right" to which the statute refers means that the entry of the limitation claimant must be within the intent to claim the land as his own and to hold it for himself. It is necessary that his entry upon or holding of the land be founded upon his having some character of title as opposed to the theory of 10 years limitation statute.

Houston Oil Co. v. Jones (Texas), 198 *Southwestern*, 290.

OWNERSHIP OF RIVER BED—LESSEE OF OWNER PROTECTED.

In an action between the United States as the representative of the Creek Nation and the State of Oklahoma and its lessee as to the ownership of the bed of a river and the right to take oil therefrom, by agreement the lessee was permitted to continue operations and a receiver was appointed to collect and hold the royalties for the benefit of the successful party. The lessee of the Indian owner of the land on the bank of the river intervened and asked protection and a temporary injunction on the ground that the title of its lessor extended to the thread of the stream, and was neither in the Creek Nation nor the State, as the stream was not navigable. Under such a showing the lessee of the Indian allottee was entitled to protection, and it was error to refuse a temporary injunction or other proper remedy.

Producers' Oil Co. v. United States, 245 *Federal*, 651.

GRANT OF ROYALTIES ON OIL AND GAS—LEGAL EFFECT.

A deed by the owner of land conveyed to the grantee one-sixteenth of all the oil and one-half of all the gas within and underlying the land described, including in the conveyance one-half of all the royalties, incomes, and rentals that may arise therefrom or accrue upon the real estate described by virtue of any oil and gas lease or lease now on said described lands or which may hereafter be placed on said lands. The grant of the "royalties, incomes, and rentals" arising from the production of the oil from the land described is a grant of the oil in such land.

Paxton v. Benedum-Trees Oil Co. (West Virginia), 94 Southeastern, 472, p. 475.

NATURAL GAS.

PUBLIC UTILITY—INTEREST OF STATE.

Natural gas is a public utility in which the State is intensely interested; and this interest has been manifested in Oklahoma in several legislative enactments and it is now the established policy of that State to conserve natural gas, as evidenced by what is known as the gas conservation act (Session Laws, 1915, ch. 197).

City of Pawhuska v. Pawhuska Oil & Gas Co. (Oklahoma), 166 Pacific, 1058, p. 1064.

REGULATION OF RATES.

In fixing the rates for the use of natural gas, the value of the property is one of the important elements. In fixing the valuation of the property of a public utilities corporation, it can not be assumed that at the expiration of the life of the corporation as fixed by a statute or by its articles of incorporation, its physical property, consisting of valuable improvements, will immediately become worthless junk. In determining a proper rate, the good will should not enter into the valuation of a public utility. Where the evidence is conflicting or doubtful, there should be no allowance for what is termed "going value." In determining whether a rate fixed for the use of natural gas is reasonable, the element of supply of gas must be considered, and this may properly be based upon the experience in the past years and not on the uncertainties of further development and production. This element necessarily includes the life of the fields from which the gas is obtained, to be determined by the testimony of experienced persons. The matter of the cost of gas, whether purchased from other companies or produced by the operations of the distributing company must be considered as an element in determining rates. An allowance for depreciation or amortization must be made. Considering these matters and others, it was determined that a flat rate of 28 cents per thousand feet, fixed by

the Public Utilities Commission of Kansas was not compensatory but was unreasonably low and confiscatory, and violative of the Constitution of the United States.

Landon v. Public Utilities Commission of Kansas, 242 Federal, 658, p. 669-679.
St. Joseph Gas Co. v. Barker, 243 Federal, 206, p. 212.

PUBLIC SERVICE COMMISSION—REGULATION OF RATES.

The order of the corporation commission establishing rates for natural gas to be charged consumers in a municipality by a natural gas company, and requiring the installation of meters, is a valid order under section 593 (Session Laws, 1913, ch. 93). The power to regulate the charges for public services by municipal corporations was intended by the framers of the Constitution to be exercised by the sovereign power only. Such power is inherent in the State and is a necessary attribute to sovereignty. The legislature had the right to legislate on this subject whenever in its judgment the public good required such action. The power delegated to a municipality to regulate charges for natural gas under section 593 was such a grant of power as could be taken away by the legislature and conferred upon the corporation commission, as was done by chapter 93, Session Laws, 1913.

City of Pawhuska v. Pawhuska Oil & Gas Co. (Oklahoma), 166 Pacific, 1058, p. 1061.

REGULATION OF RATES.

The Public Utilities Commission of Ohio is not authorized by statute summarily to fix a rate to be charged consumers of natural gas, subsequent to the expiration of a contract between the gas company and a municipality served during the period within which the operation of a new ordinance prescribing such rate is suspended by reason of the filing of the referendum petition. In such case the rate should be established in accordance with the provisions of the code.

City of Cincinnati v. Public Utilities Commission of Ohio (Ohio), 117 Northeastern 381, p. 382.

REGULATION OF RATES—VALIDITY OF STATUTE.

The statute of Oklahoma of April 2, 1915 (Session Laws, 1915, p. 407), known as the meter act, is not repugnant to or in conflict with the act conferring jurisdiction upon the corporation commission (Laws, 1913, p. 150), but is supplementary thereto. The act conferring jurisdiction upon the corporation commission to fix the charges for natural gas gave the commission authority to proceed to establish rates when it saw fit, but the act did not compel action on the part of the commission. Whether the corporation commission established rates or not by the terms of the act of April 28, 1913,

requiring the installation of meters, all persons, firms, or corporations furnishing natural gas to consumers in the municipalities therein specified were required so to do and to charge at meter rates. This act did not attempt to fix the rates and the act of April 2, 1915, also known as the meter act, was to the same effect, except that it was not applicable to certain franchises and in the absence of an order from the corporation commission fixing the rates and requiring the installation of meters, the persons, firms or corporations furnishing gas in cities having such franchises were not required to do so by virtue of the terms of the meter act. But persons or corporations furnishing natural gas in the cities mentioned were not required to install meters and charge for gas at meter rates by legislative enactment, but they were not excused from doing so if the corporation commission so ordered under the authority delegated to it by the act conferring jurisdiction on the commission.

City of Pawhuska v. Pawhuska Oil & Gas Co. (Oklahoma), 166 Pacific, 1058, p. 1063.

REGULATIONS OF RATES—POWER OF CORPORATION COMMISSION.

What are known as the meter acts in Oklahoma (acts of Apr. 28, 1913, and of Apr. 2, 1915), were not applicable to towns having a population of less than 500, and the corporation commission by virtue of the authority conferred upon it by the act of March 25, 1913 (Laws, 1913, p. 150), had authority to regulate the rates for natural gas and require the installation of meters in towns of less than 500. By virtue of the proviso in the meter act of April 2, 1915 (Laws, 1915, p. 407), in addition to the persons, firms or corporations furnishing natural gas in towns having a population under 500 not being required to install meters, persons or corporations furnishing gas in cities having a population of more than 500 under the act of April 28, 1913, were also not required to install meters and to charge at meter rates; but the proviso goes no further and does not confer any greater right. It places a municipality of over 500 population that had previously granted a franchise to a natural gas company in the same situation as are towns with a population under 500. Accordingly there is nothing in either of the meter acts to prevent the corporation commission from exercising the power delegated to it by the act of April 28, 1913.

City of Pawhuska v. Pawhuska Oil & Gas Co. (Oklahoma), 166 Pacific, 1058, p. 1063.

CHANGE IN RATES—APPLICATION OF STATUTE.

The provision in the act of April 2, 1915 (Laws Oklahoma, 1915, p. 407), to the effect "that this act shall not abrogate any existing contract, or affect or change the terms or conditions of any franchises granted by any municipal corporation prior to and in effect

April 28, 1913," merely qualifies the direct legislative mandate of that act to the persons, firms, or corporations furnishing natural gas in municipalities having a population of over 500 through standard meters at meter rates, and does not affect the power of the corporation commission, under the provisions of the act of March 25, 1913 (Laws Oklahoma, 1913, p. 150), to establish rates not inconsistent with the legislative mandate of the act of 1915. By the terms of the proviso in the act of April 2, 1915, the act does not apply to contracts and franchises granted by municipal corporations prior to and in effect April 28, 1913, where the installation of such meters and the charging at meter rates would abrogate the contract or affect or change the terms or conditions of the franchises. Any such franchise granted by a municipality and in effect on that date could not be affected by the meter act.

City of Pawhuska v. Pawhuska Oil & Gas Co. (Oklahoma), 166 Pacific, 1058, p. 1063.

REGULATIONS—APPLICATION OF CONSTITUTION.

Section 18, article 9, of the constitution of Oklahoma has no application to a public service corporation furnishing natural gas to the inhabitants of a municipality and such a corporation does not come within the terms of the proviso of that section. Section 7, article 18, of the constitution prohibits the surrender of the power to regulate charges for public services and is a limitation upon the supreme legislative power as well as upon municipalities to which the power may be delegated within constitutional limitations by the legislature and simply means that this power of sovereignty can not be surrendered.

City of Pawhuska v. Pawhuska Oil & Gas Co. (Oklahoma), 166 Pacific, 1058, p. 1063.

CONTROL OF RATES—INJUNCTION.

A State court of Kansas appointed a receiver for the Kansas Natural Gas Co., with directions to operate the franchises of the corporation and to charge the rates as fixed by the public utilities commission. On application by proper parties a Federal court enjoined the receiver from enforcing the rates fixed by the utilities commission and the rates fixed by the statute of 1911 as being confiscatory in their nature. On this being done by a Federal court it was proper for the State court, having jurisdiction of the case and of the receiver, and upon application of the latter to fix a temporary rate to be charged by the receiver pending further action in the Federal court. The order of the State court fixing the temporary rates to be charged by its receiver in no wise affected the jurisdiction or the power of the Federal court to proceed to the final determination of the cause pending therein.

Landon v. Public Utilities Commission of Kansas, 242 Federal, 658, p. 666.

St. Joseph Gas Co. v. Barker, 243 Federal 206, p. 212.

PRODUCING AND DISTRIBUTING COMPANY—CONTRACTS—REASONABLE CHARGES.

A contract was entered into between two natural gas companies by which one, a producing company, should furnish natural gas to the other, a distributing company, at a specified rate and the distributing company was to sell and distribute such gas at a specified rate. The price of the producing company was to be raised or lowered in the event the distributing company received more or less than the stipulated price for the gas. Notwithstanding this contract between the companies reasonable charges only will be allowed as against the public. In a proceeding by the distributing company to enjoin compliance with an order of the Public Service Commission of Missouri restraining the distributing company from raising the rates of the gas purchased and distributed by it, the evidence was sufficient to show that the rate fixed as a reasonable rate at which the distributing company should obtain its supply of natural gas was erroneous and the producing company was entitled to a rate equal or nearly so to that fixed by the contract between the companies. The contract price as agreed upon is *prima facie* evidence of the reasonable value of the gas.

St. Joseph Gas Co. v. Barker, 243 Federal, 206, p. 212.

Landon v. Public Utilities Commission of Kansas, 242 Federal, 658.

RIGHT TO INJUNCTION.

An owner of gas in a tract of land, or his lessee, whose title is so clear as a matter of law as to preclude the necessity of resort to a jury trial for its determination may enjoin the extraction of such gas by one who has no right thereto. If the bill for injunction alleges title in the complainant it need not allege the pendency of an action at law to try the question of title nor an intention on the part of the complainant to institute such an action.

Columbia Gas & Electric Co. v. Moore (West Virginia), 93 Southeastern, 1051, p. 1052.

EMINENT DOMAIN.

POWER TO EXERCISE.

The statute of Alabama (Code, sec. 3485) provides that mining and other companies may acquire land for ways and rights of way for railways, tramways, and roads to connect any part of their lands or works with any public road, railroad, or with their mines on other lands. The use of the word "companies" in the statute can not be attributed to a purpose to subject the rights of way therein described to condemnation by individuals or firms. To construe this section of the statute as permitting individuals to condemn the rights of way described would result in reading into the act provisions not apprehended in its title which has the effect to confine the act's provisions to matters of legislation referable alone to corporations. An unincorporated partnership is not therefore authorized to exercise this power of eminent domain.

Sloss-Sheffield Steel & Iron Co. v. O'Rear (Alabama), 76 Southern, 57.

DELEGATION OF THE POWER.

A legislature strictly speaking can not delegate the power of eminent domain. It can not divest itself of sovereign powers but it can select such agencies as it chooses and confer upon them the right to take property subject to the limitations of the constitution. The right may be conferred upon corporations, public or private, upon individuals, upon foreign corporations, or consolidated company composed in part of a foreign corporation, and upon the Federal Government. In the absence of special constitutional restrictions it is solely for the legislature to judge what persons, corporations, or other agencies may be properly clothed with this power. But when the legislature clothes corporations of a certain named class only with the power, it can not be exercised by an unincorporated partnership.

Sloss-Sheffield Steel & Iron Co. v. O'Rear (Alabama), 76 Southern, 57, p. 58.

CONSTRUCTION OF STATUTE.

Section 3860 of the Code of Alabama, relating to the delegation of the right of eminent domain, does not undertake to grant the right to condemn, but only purports to describe the mode, the place, and method of proceeding where the right to condemn has been in fact conferred or delegated.

Sloss-Sheffield Steel & Iron Co. v. O'Rear (Alabama), 76 Southern, 57, p. 58.

RIGHT TO CONDEMN RAILROAD RIGHT OF WAY FOR TIPPLE SITE.

The statute of Utah authorizes a coal company to condemn lands for a tipple site but it does not authorize a coal company to condemn any portion of a right of way used for railroad purposes for a tipple site. The statute makes all rights of way for any and all purposes subject to be connected with, crossed, or intersected by any other right of way or improvement and subject to a limited use in common with the owners thereof when necessary. The statute thus limits the interference with rights of way to crossings, intersections, and connections. There is nothing in the statute conferring the right upon any person, natural or artificial, to condemn a right of way which is devoted to a quasi-public use by a common carrier for a purpose other than a similar purpose. It gives a coal company no authority to appropriate a longitudinal strip of a right of way approximately 1,000 feet in length by 80 feet in width for the purpose of erecting permanent structures thereon to be used exclusively in the coal company's business of screening, grading, handling, and loading coal which it seeks to place on the market for sale.

Ketchum Coal Co. v. Pleasant Valley Coal Co. (Utah), 168 Pacific, 86, p. 93.

ESTABLISHMENT OF HIGHWAY—LAND OF COAL COMPANY.

Under the statute of California a county may appropriate on payment of just compensation the land of a coal company for a road, and the road when established is a public road, regardless of the number of persons using it.

Riverside County v. Alberhill Coal & Clay Co. (California Appeals), 168 Pacific, 152, p. 153.

MINING TERMS.

BOTTOM BOSS.

The person who has under his direction the men who work on the bottom.

Daly v. New Stauton Coal Co. (Illinois), 117 Northeastern, 413, p. 415.

DRUMMY.

A term applied to loose coal or rock in a mine that produces a hollow sound when tapped with any hard substance.

Dodd v. Pocahontas Consol. Collieries Co., 244 Federal, 151.

GOBBING SLATE.

Gobbing slate is a term applied where a layer of slate is found between two veins of coal and the lower vein is mined out and the upper vein and the slate are shot down, the coal loaded out and then the slate moved to one side out of the way.

Thacker v. Shelby Coal Min. Co. (Kentucky), 197 Southwestern, 633.

MINER'S WEIGHT.

Miner's weight used in a coal mining lease is the basis for a price per ton to be paid for mining and is a varying quantity of mine-run material and is such quantity of material as operators and miners may agree upon as necessary or sufficient to produce a ton of prepared coal.

Drake v. Berry (Pennsylvania), 102 Atlantic, 315, p. 320.

PARTING SLATE.

Parting slate is a term applied to a thin or varying layer of slate between two seams of coal.

Thacker v. Shelby Coal Min. Co. (Kentucky), 197 Southwestern, 633.

SLUE.

Slue is a term used by miners meaning to straighten a coal cutting machine. In cutting coal the machine moves from right to left and the back part of the machine moves faster than the front and it is necessary at intervals to stop the machine and straighten it or "slue" it, as called by miners.

Consolidation Coal Co. v. Bailey (Kentucky), 198 Southwestern, 561, p. 562.

MINING CORPORATIONS.

BOOKS AND RECORDS—PLACE OF KEEPING—INSPECTION.

The statute of Oregon requires a mining corporation, organized under the laws of that State, to keep its books and records within the State for inspection. Where the books and records of a mining corporation have been by the corporation, the directors and others controlling the corporation, wrongfully removed from the State, a court, in a proper action, may by mandatory injunction, compel the corporation to return the books and records to the State of its residence and keep there for inspection.

Baillie v. Columbia Gold Min. Co. (Oregon), 166 Pacific, 965, p. 976.

AUTHORITY OF PRESIDENT.

The president of a mining corporation who by its by-laws was the general executive officer of the corporation and given general charge of the business affairs of the corporation, but having no power to incur any debt in excess of \$500, has authority to employ counsel to represent the corporation in pending litigation and to bind the corporation, and the employment of counsel was not rendered invalid because the president agreed to pay him more than \$500.

Blue Goose Min. Co. v. Northern Light Min. Co., 245 Federal, 727, p. 731.

AUTHORITY OF PRESIDENT—SPECIFIC DUTIES.

The president of a mining corporation on suggesting that the acquisition of transportation facilities would make the operation of the mine more profitable, was authorized to investigate and make a detailed report of the feasibility of the enterprise to the directors. In conducting the investigation he employed a third person to procure rights of way, obtain subscriptions, organize a corporation for the building of an electric road from the mine to the place suggested and designated. The person employed proceeded no further than the organization of a corporation looking to the construction of the road. The corporation paid all the costs and expenses of the undertaking except the services rendered by the person so employed by the president. As the president was authorized to employ such third person, the corporation could not successfully defend an action by him on the ground that it had no power to construct the road in question.

Quick Silver Min. Co. v. Anderson, 245 Federal, 67, p. 75.

LIABILITY OF CORPORATION FOR SALARY OF OFFICER.

A director of a mining corporation operating in Utah was employed as its general manager by the general officers residing in the State of Pennsylvania. He was to receive a stated monthly salary, but the mining operations ceased to be profitable and money was advanced by the other directors and officers. A monthly deduction from the salary was then agreed upon. Subsequently the salary was reduced and the general manager refusing to accept the reduced salary demanded the "back salary" and brought suit to recover the same. The agreement among the parties is sufficient to show that the back salary was not to be exacted until sufficient ore had been mined to pay the interest on the indebtedness and to meet the current expenses of the company, and where the manager expressed his confidence in the outcome of the property, the corporation can not be held liable for such back salary unless and until it can be paid from the proceeds of the property.

Dunyon v. Scranton Min. & Smelting Co. (Utah), 168 Pacific, 755.

FRAUD OF PROMOTERS—LIABILITY FOR SECRET PROFITS—PARTIES.

Three promoters of an oil company falsely represented to their associates that certain desirable property could be acquired for \$25,000 and no less, and thereby induced their associates to consent to the purchase of the property. For that purpose they subscribed and paid for shares of the capital stock of the corporation to be issued to them and authorized the payment of the money for the property. The three promoters by a secret agreement with the vendor of the property acquired the same for the corporation at an actual outlay of \$10,000 of the corporate funds paid out of the amounts so subscribed and paid to the capital stock. In an action against the fraudulent promoters to recover the secret profits obtained by them, the corporation is the proper party plaintiff.

Jarvis v. Great Bend Oil Co. (Oklahoma), 168 Pacific, 450, p. 454.

CONSPIRACY—OFFICERS AND STOCKHOLDERS—REORGANIZATION.

Where a mining corporation had purchased a mining claim, the consideration to be paid in installments out of the proceeds of the mine, and where the mining operations were not successful and the proceeds were not sufficient to make the payments and the corporation became indebted to officers and stockholders who loaned and advanced money to make payments on the claim, the fact that the creditors, stockholders, and officers acquired title to the mine and entered into a reorganization plan with other creditors of the company does not establish a conspiracy to ruin the corporation.

Munro v. Smith, 243 Federal, 654, p. 663.

DUTIES OF DIRECTORS—RIGHT TO SUE.

The mere fact that directors of a mining corporation were elected by a vote of a stockholder against whom a suit should be brought does not raise a presumption that they will refuse to order a suit brought or will conduct such suit collusively. Under the statute directors are sworn to "faithfully and honestly discharge" the duties of their trust. The presumption is that the directors of a corporation will do their duty. If an individual stockholder would excuse his failure to make a demand on the directors to bring a suit, he must name the directors and show that they themselves are the guilty parties, or show such relationship to the guilty parties by blood, marriage, or business association or such other facts as would justify the conclusion that they will refuse to do their duty. A general allegation that the corporation or its board of directors is in control of the guilty party is not sufficient.

Baillie v. Columbia Gold Min. Co. (Oregon), 166 Pacific, 965, p. 971.

SALE OF ASSETS TO ANOTHER CORPORATION.

The statute of Montana (sec. 4409, R. S. Codes), provides that a sale may be made of all the assets of a mining corporation only when at least two-thirds of the whole number of shares of the capital stock outstanding shall at a meeting called as provided vote and direct such sale. The statute also provides that such a sale of the assets shall work a dissolution of the corporation. The statute also gives a remedy to any stockholder not consenting to the sale by which he may have his stock appraised and receive the value thereof. A stockholder objecting to such a sale and making an application to have his stock appraised according to the provisions of the statute can not challenge the constitutionality of the statute when he is seeking relief by virtue of the provisions of the statute.

Wall v. Parrot Silver & Copper Co., 244 U. S., 407, p. 409.

Woodruff v. Producers' Oil Co., 142 Louisiana, —; 76 Southern, 803, p. 804.

ASSESSMENT—SALE OF STOCK.

Sales of stock on assessments in the nature of calls on unpaid subscriptions to the capital stock of mining corporations are authorized by statute though sales on other forms of assessments are not. As the statute does authorize such sales it will be presumed on appeal in aid of a judgment that a sale was made on a form of assessment which it could be lawfully made.

Mitchell v. Blue Star Min. Co. (Washington), 167 Pacific, 130, p. 131.

SALE OF STOCK—PLACE OF SALE.

The statute of Washington prohibits the sale of stock of a mining corporation on assessments "at the office of the company" (*Remington's Code*, 1915, sec. 3694). The purpose of this provision is to

secure publicity in the sales of corporate stock and to prevent sales, behind closed doors or private offices. The word "at" often has the significance of "near" and it frequently means "in." But it should be interpreted both with reference to the context where used and with reference to the object sought to be attained. This statute requires public sales where all persons may feel free to attend and where the sale may be conducted in the public view, but these conditions are not readily obtainable in a private office. The legislature by this statute only intended to prohibit sales of corporate stock for nonpayment of assessments within the office of the company and a sale of such stock on a street by a licensed auctioneer in front of one of the doors to the building in which the company had its office is not a violation of the statute.

Mitchell v. Blue Star Min. Co. (Washington), 167 Pacific, 130, p. 131.

SALE OF STOCK—VALIDITY—PLACE NOT FIXED BY BY-LAWS.

The statute of Washington (Remington Code, 1915, sec. 3694) prohibits the sale of forfeited stock of a mining corporation at the office of the company. The statute does not expressly or impliedly provide in enumerating necessary conditions attending such sales that the place of sale shall be named or fixed in the by-laws. The statute does require that notice of such sales be published, and contemplates that the notice shall name both place and time, as these are two of the essential features necessary to be included in due notice. A provision in a by-law fixing a stated or permanent place for such sales would not be a reasonable one, as the place as well as the time of such sales is not a matter of permanency, but is subject to the fluctuating demands of expediency. Such a sale of stock on due notice as to the time and place can not be held invalid because the by-laws of the corporation did not prescribe the place where such sales should be made.

Mitchell v. Blue Star Min. Co. (Washington), 167 Pacific, 130, p. 131.

RIGHT OF CORPORATION TO PURCHASE ITS STOCK.

A mining corporation can not ordinarily purchase its own stock as this would amount to a reduction of its capital stock in contravention of the statute. But a mining corporation may acquire its own capital stock in settlement or payment of an indebtedness to it. This exception is supposed to rest on a necessity which arises in order to save loss. And an assessment levied upon stock for the purpose of collecting the unpaid stock subscription is an indebtedness for which the corporation can purchase the stock when offered for sale.

Mitchell v. Blue Star Min. Co. (Washington), 167 Pacific, 130, p. 131.

CORPORATION HOLDING STOCK OF ANOTHER—DUTY OF PRESIDENT.

When a mining corporation acquires a majority of the stock of another mining corporation, it assumes the obligation to manage the affairs of the controlled corporation for the benefit of all the stockholders and not for its own advantage. It is the duty of the president of a mining corporation, who was one of its directors, to conduct the company's affairs with an eye single to the interest of the company.

Baillie v. Columbia Gold Min. Co. (Oregon), 166 Pacific, 965, p. 974.

ASSIGNMENT OF STOCK PROCURED BY FRAUD—RIGHT OF ASSIGNEE TO SUE.

A stockholder and the secretary of a mining corporation, both familiar with the properties belonging to the corporation and having better knowledge than the other stockholders of the values of its properties, represented to their fellow stockholders that there was an undisclosed purchaser for their stock who would pay \$5 and no more per share if placed in escrow in one block in a certain bank to be taken by such purchaser upon making the payment. They also represented that the stock was not worth more than \$5 per share and could not be sold for more than that sum, and that they themselves would join with their fellow stockholders in placing their stock in such escrow to be sold at \$5 per share. Relying upon these representations and upon the superior knowledge of the situation possessed by the two stockholders and having no knowledge to the contrary, the other stockholders did assign their stock and did place the same in escrow for transfer to such undisclosed purchaser at the stated price of \$5 per share. Thereafter the purchaser went to the bank and on payment at the rate of \$5 per share for the stock received the same and paid to the two conspiring stockholders an additional sum of \$3 per share on all the shares of stock sold. Upon learning of the fraud, the original stockholders, so defrauded, assigned and transferred their respective claims, demands, and causes of action against the two conspiring stockholders in trust for collection and the assignee brought suit against the two conspiring stockholders for damages for the fraud. The rule is that a naked right to sue for fraud and deceit is not assignable; but if an interest in property passes by the terms of the assignment it gives to the assignee the right to enforce the remedies of his defrauded assignors. In this case the several causes of action of the defrauded stockholders were assignable, as they were not merely causes of action for fraud or deceit, but involved substantial rights of property.

McCord v. Martin (Cal. App.), 166 Pacific, 1014.

ULTRA VIRES ACTS—ACQUIESCENCE OF STOCKHOLDER.

The expenditures made by a mining company in a mining enterprise located in a different State and owned by another mining company are ultra vires. But a stockholder who assented to the policy of investing the funds of the corporation in outside enterprises and who himself assisted and was active in making such expenditures and in conducting the enterprise itself can take no advantage of such expenditures in a suit by him against the corporation and a managing director to recover for misappropriation of the corporate funds.

Baillie v. Columbia Gold Min. Co. (Oregon), 166 Pacific, 965, p. 974.

BY-LAWS—AMENDMENT—ADOPTION AND VALIDITY.

An amendment to the by-laws of a mining corporation made at a regular meeting of the stockholders of the company at which a majority of the stock was represented must be held to be regular and valid.

Mitchell v. Blue Star Min. Co. (Washington), 167 Pacific, 130, p. 131.

BY-LAWS—ASSESSMENT ON STOCK SUBSCRIPTIONS.

A by-law of a mining corporation provided that no assessment should be levied while any portion of a previous one remains unpaid, unless the power of the corporation had been exercised for the purpose of collecting any such previous assessments. The purpose of such by-law is to protect stockholders who have fully complied with assessments made against their stock and all such stockholders were not to be burdened with subsequent assessments until all stockholders had contributed pro rata. Such a by-law can not mean or does not mean that one who fails to pay an assessment against his stock thereby exempts himself against any further assessments.

Pennecard v. Giant Ledge Min. Co. (Washington), 166 Pacific, 629.

BY-LAWS—REPEAL.

The by-laws of a mining corporation provided that they might be altered, amended, or revoked by a majority of the trustees at any monthly meeting, provided notice had been given at a previous meeting of any intended change and that such proposed change could not be acted upon for at least one month from the time of giving o notice. On June 9 the trustees, at a regular meeting, made certain changes in the by-laws affecting the manner of making assessments on stock subscriptions. The next regular meeting of the trustee was held July 14, at which time the only business transacted was the approval of the transaction of the meeting of June 9.

In order to affect the repeal of the by-law in controversy it is not necessary to show that notice was given of the intended change where the same trustees were present at both meetings, but the change proposed at the meeting of June 9 would not take effect until the regular meeting of July 14 and at that time the repeal would be effective.

Pennecard v. Giant Ledge Min. Co. (Washington), 166 Pacific, 629, p. 630.

DIVIDENDS—DUTY AND POWER TO DECLARE.

Generally the officers of a corporation are the sole judges of the propriety of declaring dividends; but when directors use their powers illegally, wantonly, or oppressively a court of equity at the instance of a minority stockholder will interfere to prevent such conduct. Thus a minority stockholder may compel the declaration of dividends when he clearly shows that the directors are guilty of fraud or by bad faith in accumulating a large surplus and refusing to pay dividends.

Baillie v. Columbia Gold Min. Co. (Oregon), 167 Pacific, 1167, p. 1168.

See *Baillie v. Columbia Gold Min. Co.* (Oregon), 166 Pacific, 965.

POWERS OF CORPORATION—DECLARATION OF DIVIDENDS—CONTROL BY COURT.

The powers vested in a corporation are exercised by the directors and one of these powers is the declaration of dividend. Ordinarily the question of whether dividends shall be declared by a corporation is one of internal management with which the courts will not interfere. Directors must act honestly and with discretion in the performance of their duties and this principle applies to their actions in the matter of dividends. It is only in a clear case that equity may sometimes compel a corporation to declare dividends. But it must be averred and proved that the board of directors of the corporation has abused its discretion in withholding dividends. If there are reasonable grounds for withholding dividends the discretion of the directors will not be interfered with. An individual stockholder may maintain his action against the corporation for fraudulently withholding his share of the money received by it which ought to have been divided among the stockholders. It is only where a court can see that the powers of the directors will be abused to the injury of the complaining stockholder and that the circumstances clearly call for the declaration of a dividend that a court will interfere.

Baillie v. Columbia Gold Min. Co. (Oregon), 166 Pacific, 965, p. 969.

DIVIDENDS—DISTRIBUTION OF PROPERTY.

Whether a distribution of corporate property is to be regarded as a dividend or not does not depend upon the status of the person that receives a share but on what is done by the distributor. The

money or property in such case is owned by the distributor and as owner he has the power to decide what is to become of it. After the stockholder receives it he may use it as he likes, but it comes into his hands as dividend whether he is an individual or a corporation. Under this doctrine a principal corporation holding stock of subsidiary companies and receiving property or money from such companies receives it as a dividend, and paying a dividend such principal corporation must pay an excise or franchise tax for 2 months of the year 1913 and an income tax for the remaining 10 months.

Lewellyn v. Gulf Oil Corp., 245 Federal, 1, p. 7.

Reversing, Lewellyn v. Gulf Oil Corp., 242 Federal, 709.

RECOVERY OF DIVIDENDS—LIMITATION OF ACTION.

A minority stockholder began an action in September, 1915, to recover from the corporation his share of dividends on the alleged grounds of a wrongful conversion of the corporate funds by the person who elected the directors and controlled the management of the corporation and had fraudulently converted the funds of the corporation to his own use. The complainant alleged that the moneys were misappropriated and converted in the years 1898, 1900, and 1901 without his knowledge, and that the entries in the books of the mining corporation were made long after the alleged misappropriations. The complainant alleged that at the time of the beginning of the suit the defendants, except the mining corporation, resided in another State. No other excuse for the long delay in bringing suit was alleged or given. Under the statute of Oregon an action at law to recover a dividend must be brought within six years and if a suit in equity is brought after the expiration of the time allowed to sue at law the complainant must explain the delay in his bill and sufficiently allege the impediments to an earlier prosecution of his claim. It is true that the statute of limitations does not begin to run against a stockholder claiming a dividend until the dividend is declared; but the principle can not apply where the stockholder contends that the fraud of those in control of the corporation constituted an equitable declaration of a dividend and where it appears that the fraud depended upon was perpetrated more than six years prior to the bringing of the suit.

Baillie v. Columbia Gold Min. Co. (Oregon), 166 Pacific, 965, p. 971.

MISAPPROPRIATION OF CORPORATE FUNDS—LIABILITY—STATUTE OF LIMITATIONS.

A majority stockholder in a mining corporation, alleged to have converted and wrongfully appropriated to his own use the corporate funds, is liable to account for the same in a proper action, and he can not successfully plead the statute of limitations to such an action

unless he can show that he has been in the State of the residence of the corporation more than six years since the date of the alleged conversion.

Baillie v. Columbia Gold Min. Co. (Oregon), 166 Pacific, 965, p. 971.

RIGHT OF STOCKHOLDER TO SUE FOR COMPANY.

Whether or not a mining corporation shall seek to enforce in the courts a cause of action for damages is ordinarily a matter of internal management within the discretion of the board of directors in the absence of instructions by a vote of the stockholders. Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust or where they stand in a dual relation which prevents an unprejudiced exercise of judgment. Where there is no allegation that a mining company is in the control of the alleged wrongdoers or that its directors have been guilty of any misconduct whatsoever, and no allegation that their action in refusing to bring suit is unwise, and where no application was made to the stockholders as a body and no opportunity given to make it, and where the course pursued by the directors may have the approval of all the stockholders except the suing plaintiff, a court will not interfere with the management of the corporation and will not permit a single stockholder under such circumstances to maintain an action at law against the corporation. The fact that the cause of action is based on the alleged violation of the Sherman antitrust law does not give to individual stockholders the right to interfere with the internal management of the corporation.

United Copper Co. v. Amalgamated Copper Co., 244 U. S., 261, p. 263.

RIGHT OF MINORITY STOCKHOLDER TO SUE.

A minority stockholder in a mining corporation can not in the first instance maintain an action against the corporation and the directors and officers for the conversion of the corporate funds, as such wrongs are primarily wrongs done the corporation itself and the injury sustained by the complainant as a stockholder was consequential, and the right of action for the recovery of the moneys alleged to have been taken and converted is primarily in the corporation itself.

Baillie v. Columbia Gold Min. Co. (Oregon), 166 Pacific, 965, p. 969.

A minority stockholder can not maintain an action in his individual capacity against the corporation and the directors, other corporations, and an individual who controlled all the corporations named where his action does not purport to be brought on behalf of all stockholders similarly situated, and where the complaint fails

to allege a demand on the board of directors to bring suit in the name of the corporation and no sufficient excuse is stated for such failure to make the demand. The failure to make these averments is not excused by an averment to the effect that the plaintiff is the only stockholder not concerned in the frauds complained of. A minority stockholder has a right to sue on behalf of the corporation in a proper case.

Baillie v. Columbia Gold Min. Co. (Oregon), 166 Pacific, 965, p. 970.

RIGHTS OF MINORITY STOCKHOLDER—REMEDY—RECEIVER.

A majority stockholder in a mining corporation elected the directors and himself controlled and managed the business of the corporation, converted and misappropriated the funds of the corporation and invested and used them in the business and operations of other corporations managed by him, and removed the books and records of the mining corporation from the State of its residence to a distant State and refused inspection thereof by a minority stockholder. This method of conducting the business of the corporation extended over a period of 15 years with no accounting to the mining corporation and no dividends being declared by its directors. A minority stockholder in the mining corporation who mistook his remedy and brought his action directly against the corporation, the directors, and the majority stockholder who so mismanaged and converted the funds of the corporation, though not permitted to recover in such an action, may have his remedy by amending his complaint and asking for the appointment of a receiver to take charge of the property of the mining corporation, to compel the return of the books, and require a proper accounting and the return of all moneys due the corporation.

Baillie v. Columbia Gold Min. Co. (Oregon), 166 Pacific, 965, p. 975.

PURCHASE OF PROPERTY BY STOCKHOLDERS—GOOD FAITH AND VALIDITY.

A mining corporation purchased a mining claim for a stated consideration, payment to be made in installments from a certain portion of the proceeds of the mining, with an option to abandon the tract, the only penalty being a forfeiture of the payments made. The mining enterprise was not a success, and for the want of funds on the part of the corporation operations were shut down. The company made some payments out of money borrowed or contributed by stockholders and was in debt to the stockholders for the sums advanced or paid. Under such circumstances it can not be held that the corporation was injured where certain stockholders who had made considerable advances secretly purchased the mining claim for their own protection and without any intention of making

any secret profit at the expense of the corporation. The purchasing stockholders did not use their position or their knowledge to prevent the company from accomplishing its purpose or acquiring the property in accordance with its plan. They took nothing which belonged to the corporation and imposed upon it no new burden in accomplishing its purpose and did not stand in such fiduciary relation as to raise a constructive trust because of a breach of duty.

Munro v. Smith, 243 Federal, 654, p. 657.

MORTGAGE—FRAUDULENT SALES OF STOCK—KNOWLEDGE OF MORTGAGEE.

A mortgagee is not to be denied the right to foreclose his mortgage executed by a mining corporation on a mining claim on the ground of fraudulent sales of the capital stock of the mining corporation, where there is no evidence to show that the mortgagee had any part in any such fraudulent sales.

Myers v. Indiana Min. Co. (Oregon), 168 Pacific, 719, p. 720.

STATUTE REQUIRING CORPORATIONS TO SELL LAND—APPLICATION.

An oil and gas service corporation comes within the provisions of the statute of Oklahoma (Session Laws, 1907-8, chap. 13), requiring all corporations doing business in the State to sell and dispose, within a period of seven years, of all the real estate owned by it other than that within the corporate limits of cities and towns, unless the same shall be necessary and proper for carrying on the business for which such corporation was licensed or chartered.

State v. Prairie Oil & Gas Co. (Oklahoma), 167 Pacific, 756.

BONDS—PARTITION—ESTOPPEL.

A bank held a mortgage on certain mining properties to secure the debt of two of its directors, who were the owners of the mining property. Subsequently the debtors induced the bank to release them and to accept bonds of a mining corporation to the amount of the debt, secured by a mortgage on the same mining property. The debtors, without the knowledge of the bank, issued bonds on a parity with those issued to the bank and largely in excess of the value of the mining property. Under such circumstances the bonds held by the bank must take precedence and have superiority over the other bonds issued and the property of the mining corporation must first be devoted to the payment of the bonds held by the bank.

Mercantile Trust Co. v. Sunset Road Oil Co. (California), 168 Pacific, 1033, p. 1034.

Mercantile Trust Co. v. Sunset Road Oil Co. (California), 168 Pacific, 1036.

INJUNCTION—PARTIES.

A mining corporation in Mexico held the legal title to certain mining property, but all of its capital stock was turned over to an Arizona corporation which was to finance and operate the mining property. The Arizona corporation sold a part of the capital stock to another mining company and to the president and organizer of the Mexican and Arizona companies and pledged the remaining shares to secure an indebtedness of the president. The pledgee of the part of the stock assumed control and reorganized the Mexican corporation and through a board of directors controlled by him entered into an agreement for the sale of the mining property. The corporation purchasing a part of the shares of stock of the original Mexican corporation can not maintain a bill to enjoin the reorganized Mexican company from selling the mining property without making the original Mexican corporation and the pledgee of the other shares of the capital stock parties to the bill.

Virginia C. Min., etc., Smelting Co. v. Corrigan, 242 Federal, 809, p. 811.

STATUTE OF LIMITATIONS—WAIVER OF DEFENSE.

In an action by a minority stockholder against a mining corporation and others to recover his share of money abstracted from the corporation, the corporation is the adverse party and is entitled at its election to insist on the defenses of laches and the statute of limitations.

Baillie v. Columbia Gold Min. Co. (Oregon), 167 Pacific, 1167.

See *Baillie v. Columbia Gold Min. Co. (Oregon)*, 166 Pacific, 965.

INCOME—ROYALTIES ON MINES.

Royalties paid by the lessees of mines to the lessor by virtue of leases are not to be viewed as the proceeds of property sold, but as rents and therefore fairly within the term "income" under the corporation tax act.

Phister Land Co. v. City of Milwaukee (Wisconsin), 165 Northwestern, 23, p. 24.

APPOINTMENT OF RECEIVER—POWER OF EQUITY.

It is within the general powers of a court of equity to grant a receiver over a corporation, where, through such receiver, the relief of a minority stockholder can be best worked out. This right is to be exercised sparingly and with great caution to the end that the innocent be not made to suffer with or for the guilty. But where there are no innocent stockholders or creditors liable to injury from the appointment and where the rights of a minority stockholder victimized by the frauds of the majority stockholders can be best secured to him through a receiver, the relief will be granted.

Baillie v. Columbia Gold Min. Co. (Oregon), 167 Pacific, 1167, p. 1169.

EXCESSIVE FREIGHT RATE—RECOVERY.

A mining corporation that has been compelled to pay a greater freight rate for intrastate shipments of coal for a short distance than it or others is required to pay for a greater distance, may under the constitution of Missouri (sec. 12, art. XII), recover any such excess of freight so paid.

Missouri Pacific R. Co. v. McGrew Coal Co., 244 U. S., 191, p. 199.

OWNERSHIP OF SOIL ON BANK OF NAVIGABLE STREAM.

A mining corporation owning coal lands along a navigable river has no right or title to the soil along the bank of the stream, and a contractor employed by the coal company to erect a tipple can not justify the destruction of a sunken vessel in the stream on the ground that the mining company with whom he had the contract had riparian rights.

De Bardeleben Coal Co. v. Cox (Alabama), 76 Southern, 409, p. 410.

TIPPLE SITE—CONDEMNATION OF LAND.

The statute of Utah gives a local company the right to condemn land for a tipple site for handling and loading coal on cars.

Ketchum Coal Co. v. Pleasant Valley Coal Co. (Utah), 168 Pacific, 86, p. 93.

COAL COMPANY LIABLE FOR WATER SUPPLY.

A coal-mining company under a contract by which a water company was to furnish it 250,000 gallons of water a day at the rate of 5 cents per thousand gallons is not liable for the full amount of water stipulated, regardless of the amount used, where the water company did not obligate itself to furnish that amount per day and where a minimum rental per year was expressly stated.

Mountain City Water Co. v. Harleigh-Brookwood Coal Co. (Pennsylvania), 101 Atlantic, 734.

INCOME TAX—LAW GOVERNING.

A resident corporation receiving rents in the form of royalties upon leased mines located in a foreign State, is subject to the income tax act of 1911, as the question as to whether royalties paid annually on such mines are rentals is to be determined by the law of this State and not according to the law of the State where the mines are located.

Phister Land Co. v. City of Milwaukee (Wisconsin), 165 Northwestern, 23, p. 25.

FOREIGN CORPORATION—APPEARANCE TO ACTION—JUDGMENT BINDING.

A foreign corporation that voluntarily appears to an action pending in a State other than that of its State, is bound by the judgment entered and it is immaterial whether or not the corporation was

engaged in business in the State where the judgment was rendered or had property there, or had complied with the statute requiring it to designate an agent in the State on whom service might be had.

Blue Goose Min. Co. v. Northern Light Min. Co., 245 Federal, 727, p. 730.

NONRESIDENCE—JOINDER WITH RESIDENT—REMOVAL OF CAUSE.

A nonresident mining corporation joined with a resident in an action for damages for injuries due to the alleged negligence of the mining corporation and of the resident codefendant is not entitled to removal of the cause to the Federal court merely on the ground of alleged fraudulent joinder for the purpose of jurisdiction without proof of fraud or fraudulent purposes in joining the nonresident corporation with the resident defendant.

West Kentucky Coal Co. v. Key (Kentucky), 198 Southwestern, 724, p. 725.

REMOVAL OF CAUSE—FINDING IN FAVOR OF RESIDENT CODEFENDANT.

A mining corporation organized in the State of New Jersey was carrying on its mining operations in Kentucky. A miner injured by the defective electrical appliances of the mining company brought suit for damages against the nonresident mining corporation and the resident electrician, in its employ, alleging that the injuries complained of were due to the negligence of both. Upon the trial of the case on its merits, the jury found in favor of the resident electrician and against the mining company. The verdict in favor of the resident defendant did not operate to make the cause then removable and it can not be regarded as conclusive of a fraudulent joinder for the fraudulent purpose of giving a State court jurisdiction over the nonresident corporation.

West Kentucky Coal co. v. Key (Kentucky), 198 Southwestern, 724, p. 725.

MINING CLAIMS.

NATURE AND GENERAL FEATURES.

NUMBER OF LOCATIONS UNLIMITED.

Congress has not fixed any limit to the number of locations that may be made by the same person or persons, but its policy has always been to encourage the exploration of the public lands and the discovery and development of such minerals as may be found in them.

Consolidated Mutual Oil Co. v. United States, 245 Federal, 521, p. 523.

SALE OF INTEREST—CASH VALUE.

The price fixed by an agreement to purchase a mining claim, the sum payable in monthly installments out of the net returns of the mining, with the guaranty of certain minimum monthly payments, in order to acquire a full title and with the privilege of abandoning the tract at any time by forfeiting payments made, is a most uncertain indication of the actual cash value of the property. As the payments are optional and made contingent upon success, the vendors may ask more and the vendee may be willing to pay more than in an outright cash purchase.

Munro v. Smith, 243 Federal, 654, p. 657.

MINERAL CHARACTER—JURISDICTION OF LAND DEPARTMENT.

The Land Department has jurisdiction and full authority on its own motion or at the instance of others to inquire into the bona fides of a claimed settlement upon public land, though unsurveyed and though no entry based upon the settlement has been allowed, and to determine as a question of fact the mineral character of the land and the validity of a mining location in a national forest, although the locator has not applied for a patent.

Nicholas & Smith, In re 46 Land Decisions, 20, p. 26.

VEIN OR LODE.

PRESUMPTION AS TO DIRECTION.

Where a mining claim has been duly located on the apex of a vein and the vein has in part been disclosed, and so far as thus known its course or strike is parallel to the side line, it may be inferred or presumed that the strike of the undisclosed portion is substantially the same as that which has been exposed. But this is an inference

of fact and not a presumption of law. It does not follow from the location of the claim or the directions of the boundary lines thereof, but from the actual course of the apex of the portion of the vein as disclosed.

Bourne v. Federal Min. & Smelting Co., 243 Federal, 466, p. 469.

PRESUMPTION AS TO CROSSING SIDE OR END LINES.

Where a vein or lode in an established mining claim is found to have a certain course so far as it is disclosed, an inference may be drawn that it will continue in the same direction. If a vein crosses an end line and for some distance the strike is parallel to the side lines, it is not unreasonable to conclude that the vein continues in that direction. But where a vein enters a claim by intersecting a side line instead of an end line, and so far as it is definitely determined its course is more nearly parallel with the end lines than with the side lines, if any inference is to be drawn, it must be to the effect that the vein intersects the other side line rather than the other end line. But where a vein on entering a claim crosses a side line at an angle and its direction is unknown or is irregular, there is no more reason to infer that it passes out of the claim through an end line than through the other side line. No presumption on this subject will be indulged where there is no substantial basis on which an intelligent estimate of the probability can be made.

Bourne v. Federal Min. & Smelting Co., 243 Federal, 466, p. 469.

MINERAL CHARACTER OF LAND.

DETERMINATION—JURISDICTION OF LAND DEPARTMENT.

In an application for a patent for an alleged mining claim the Land Department possesses the jurisdiction to inquire into and determine the facts as to the mineral character of the land embraced in the location sought to be patented, and it has the jurisdiction to determine the mineral character of a mining location situated within a national forest reserve.

Cameron v. Bass (Arizona), 168 Pacific, 645, p. 646.

MINERAL CHARACTER OF LAND—VALIDITY OF LOCATION.

The determination by the Land Department in an application for a mining location that the land embraced within the location is non-mineral, and therefore not subject to location under the mining laws, renders the location void ab initio, and such pretended location gives the locator no rights therein. The locator's possession of such a claim is subject to termination by the Government at any time and is terminated by being set aside and included within the boundaries of a national forest reserve.

Cameron v. Bass (Arizona), 168 Pacific, 645, p. 647.

LOCATION OF CLAIM.**ORDER OF PERFORMANCE OF REQUIREMENTS.**

Where no rights of third persons intervene the order in which the statutory requirements concerning the making of mining locations are complied with is immaterial. The marking of the boundaries of a claim may precede the discovery, or discovery may precede the marking, and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator as of the date of the later, and a complete possessory title to the location will vest in the locator as of the later date.

Consolidated Mutual Oil Co., v. United States, 245 Federal, 521, p. 524.

LOCATION NOTICE AND CERTIFICATE.**VALIDITY—EFFECT ON TITLE.**

Recorded certificates of location constitute the first muniment of the locator's paper title, and when verified are, by the statute of Montana (Codes, 1907, secs. 2284–2285), made *prima facie* evidence of all facts properly recited therein. When such certificates are apparently valid but under the mining laws are actually invalid, they constitute a cloud upon the locator's title.

Hopkins v. Walker, 244 U. S., 486, p. 491.

DISCOVERY.**ELEMENTS AND WHAT CONSTITUTES.**

Diligent prosecution of work leading to discovery upon a mining claim depends so largely upon the physical conditions of the locality, the nature and situation of the region, its accessibility, the magnitude of the work, the difficulty of securing materials and supplies and the like, that each case must rest largely upon its own facts and circumstances, and a decision in one may be of little assistance in another.

United States v. North American Oil, Consolidated, 242 Federal, 723, p. 727.

LOCATOR PROTECTED.

A locator who has properly marked his location in compliance with the provisions of the statute and is in actual possession of his claim and is making bona fide efforts leading to a discovery, will be protected by the courts against any forcible, fraudulent, surreptitious or clandestine entry by any third party.

Consolidated Mutual Oil Co., v. United States, 245 Federal, 521, p. 524.

ASSOCIATION CLAIM—SINGLE DISCOVERY.

Marking boundaries, doing assessment work, and expenditures for patent on an association claim of 160 acres are treated as an entirety under one location, and for the purpose of discovery it shall

be treated in the same manner. A single discovery on such a claim is sufficient to support the location.

Consolidated Mutual Oil Co. v. United States, 245 Federal, 521, p. 523.

CANCELLATION—RULE OF PROPERTY.

The rule that mineral entries in the Warren mining district would not be canceled, although without any actual discovery of a vein or lode but made upon land which was found to be mineral in character, has become a rule of property recognized and followed by the Land Department. This rule of property can not apply to locations made after the rule of property was announced, and especially where the mining location in controversy was not made upon lands known to be mineral in character, but in fact upon land already entered under the homestead law.

Gonzales v. Stewart, 46 Land Decisions, 85, p. 88.

EXTRALATERAL RIGHTS.

RIGHT TO FOLLOW VEIN—BURDEN OF PROOF.

Where the owner of one mining claim seeks to follow his vein beneath the surface of another claim, he has asserted an extraordinary right not incident to ownership under the common law but conferred by statute. In an action to enforce such a right he assumes the burden of proof, and it is incumbent upon him to show by a preponderance of the evidence that the location of his claim under the law entitles him to follow the vein or lode apexing therein to and into such other claim.

Bourne v. Federal Min. & Smelting Co., 243 Federal, 466, p. 468.

VEIN CROSSING END LINE.

The owner of a mining claim can not follow the vein or lode apexing in his claim, on the theory of extralateral rights, beyond the vertical plane of a side line unless the vein intersects at least one of the end lines.

Bourne v. Federal Min. & Smelting Co., 243 Federal, 466, p. 468.

VEIN CROSSING SIDE LINE.

The owner of a mining claim has no extralateral rights on a vein apexing in his claim where such vein crosses the side lines instead of the end lines. Where this is true he is not entitled to pursue the vein on its dip beyond the vertical plane of his side line.

Bourne v. Federal Min. & Smelting Co., 243 Federal, 466, p. 470.

ASSESSMENT WORK.

GROUP CLAIMS—ASSESSMENT WORK—BENEFICIAL EFFECT.

Where two or more contiguous claims are held by the same person or persons, work done in good faith upon one of them or outside of

the boundaries of either of them that directly tends to the development or benefit of all the claims for mining purposes, is applicable to each and all of such claims and is a compliance with the statute relating to assessment work.

Consolidated Mutual Oil Co. v. United States, 245 Federal, 521, p. 523.

ASSESSMENT WORK UPON GROUP CLAIMS—NUMBER LIMITED.

Congress by an act approved February 12, 1903 (32 Stat. at Large, 825), provided that where oil lands are located as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, but the act expressly limits the right to do such work to claims not exceeding five in all. The labor must tend to the development, or to determine the oil-bearing character, of such contiguous claims.

Consolidated Mutual Oil Co. v. United States, 245 Federal, 521, p. 523.

POSSESSORY RIGHTS.

ASSIGNMENT—RIGHT OF ASSIGNEE.

A person in possession of a mining claim, claiming under an alleged locator either as assignee or as his representative or agent, can have no greater rights than the locator himself.

United States v. Brookshire Oil Co., 242 Federal, 718, p. 721.

RIGHTS AND INTERESTS—OWNERSHIP OF SURFACE.

The owner of a mining claim is *prima facie* the owner of the surface and of all beneath the surface, and this presumption of exclusive ownership is effective to repel intrusion by anyone who does not come clothed with a title acquired by virtue of a compliance with the provisions of the statute.

Bourne v. Federal Min. & Smelting Co., 243 Federal, 466, p. 468.

TRANSFER OF RIGHT OF POSSESSION.

The right possessed by the locator of a mining claim to maintain his possession against intruders while in good faith seeking to discover minerals within the boundaries of his claim is a right of value and it may be transferred or conveyed to another.

Consolidated Mutual Oil Co. v. United States, 245 Federal, 521, p. 525.

MINING CLAIM AS PROPERTY.

A mining claim perfected under the law is property in the highest sense of the term and may be bought, sold, and conveyed and will pass by descent.

Consolidated Mutual Oil Co. v. United States, 245 Federal, 521, p. 527.

POSSESSORY ACTIONS.

ACTIONS TO QUIET TITLE—JURISDICTION OF FEDERAL COURTS.

The owner of a patented placer claim filed a bill in equity to quiet his title against certain lode locators in which he alleged that at the time of his application for patent no mineral vein or lode was known to exist within the boundaries of his placer claim; that pending his application certain lode claimants filed adverse claims seeking to establish their rights to lode locations within the limits of the placer claim; that judgments were rendered in favor of the placer applicant and that upon final hearing a patent to the placer claim was issued. The bill further alleged that notwithstanding such adjudication the defendant subsequently made pretended lode locations within the limits of such placer claim, caused their certificates to be recorded, and that such certificates as recorded constitute clouds upon the complainant's title. Such allegations plainly show that a controversy respecting the construction and effect of the United States mining laws is involved and is sufficiently real and substantial to bring the case within the jurisdiction of a Federal court.

Hopkins v. Walker, 244 U. S., 486, p. 488.

QUIETING TITLE AGAINST INVALID CERTIFICATES.

A locator or the owner of a placer mining claim may maintain a bill in equity to quiet his title against recorded certificates of lode locations made within the limits of his placer claim in violation of his rights and which certificates in fact constitute a cloud upon his title.

Hopkins v. Walker, 244 U. S., 485, p. 491.

ACTION TO ENFORCE RIGHTS.

A person who has made a discovery of minerals within the boundaries of this claim, has performed other necessary acts of maintaining the boundaries on the ground, the posting and recording of the location notice, sinking of the discovery shaft, and who has each year from the time of his location performed the necessary amount of the required annual work and labor, has performed at least \$100 worth of work and improvements upon the claim each year, shows a prima-facie right to the exclusive possession of the claim and may maintain an action to enforce such right and to restrain a trespass upon his claim.

Cameron v. Bass (Arizona), 168 Pacific, 645, p. 646.

PATENTS.

CONSTRUCTION AND VALIDITY—VACATION—COLLATERAL ATTACK.

A patent to a mining claim or to agricultural lands subsequently claimed to be mineral is an adjudication by the Land Department

and a conveyance of the title to the land which the patent described, and raises a presumption of right and regularity in all the proceedings antedating it and of perfect title in the grantee. When a patent is issued for agricultural lands it is an adjudication of the Land Department that the land so granted was not mineral land, and such adjudication is impervious to collateral attack. The Government may avoid such a patent by suit in equity for false and deceitful representations of material facts which induced its issuance, but the burden is upon the Government in such an action to establish the fraud charge, not only by a preponderance of conflicting evidence but by evidence that commands respect and that amount of it which produces conviction.

United States v. Beaman, 242 Federal, 876, p. 879.

TRESPASS.

VALIDITY OF LOCATION—NONMINERAL LAND—PLEADING.

In an action by the locator of a mining claim to restrain an alleged trespass where he avers sufficient facts to make a *prima facie* case of his right to possession, an answer setting up that the land located was in fact nonmineral and that patent had been denied the complainant by the Land Department because of its nonmineral character, states new matter and must be denied by the complainant or it will be taken as true.

Cameron v. Bass (Arizona), 168 Pacific, 645, p. 646.

PLACER CLAIMS.

ASSOCIATION LOCATION—SINGLE LOCATION.

A location made by an association of persons is one location covering 160 acres and not eight locations covering 20 acres each. It is in law a single location and as such a single discovery is sufficient to support such a location.

Consolidated Mutual Oil Co. v. United States, 245 Federal, 521.

NUMBER PERMITTED TO EACH PERSON OR ASSOCIATION.

There is no limit as to the number of mining claims an individual or an association of individuals may locate, but no claim shall exceed 20 acres for each individual or 160 acres for any association. This is a positive limitation of the amount of mining ground that any one claimant may appropriate individually or as a member of an association in any one claim, and he can not evade the law by the use of the names of friends, relatives, or employees. Any device whereby one person is to acquire more than 20 acres or an association more than 160 acres in area by one discovery is a fraud against the Government and is without legal support and void.

United States v. Brookshire Oil Co., 242 Federal, 715, p. 721.

CONVEYANCE INCLUDES KNOWN VEIN.

The conveyance of a placer claim, as a matter of law, includes all known veins and lodes of quartz within its limits.

Wilbur v. Everhardy (California), 167 Pacific 861, p. 862.

QUIETING TITLE AGAINST LODGE CLAIMANT—FEDERAL JURISDICTION.

A cause of action arising under the mining laws of the United States where the allegations of a bill to quiet title by the owner of a patented placer mining claim, in a suit against certain pretended lode locators whose pretended locations were made and whose certificates of such locations were filed after the complainant's placer patent was issued, sufficiently disclosed that it really and substantially involved a dispute or controversy respecting the validity, construction, or effect of a law of Congress. It is sufficient if the plaintiff's cause of action, unaided by any anticipation or evidence of defense, disclosed that it really and substantially involved a dispute or controversy respecting the validity, construction, or effect of a Congressional enactment.

Hopkins v. Walker, 244 U. S., 486, p. 489.

LODE LOCATIONS WITHIN PLACER LIMITS—QUIETING TITLE—
JURISDICTION.

Section 2333, United States Revised Statutes, authorizes a person to enter upon a patented placer claim and locate within such claim a lode or lodes known to exist at the time of the filing of the application for a placer patent. The owner of a patented placer claim may bring suit to quiet title against a subsequent lode locator and show an adjudication in his favor as to the nonexistence of lodes within his placer limits. The allegations of his bill as to the existence, invalidity, and recording of the defendant's certificates of such pretended and invalid locations form a part of the complainant's cause of action, as the facts showing the plaintiff's title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title, are all essential parts of the complainant's cause of action.

Hopkins v. Walker, 244 U. S., 486, p. 489.

OIL LOCATION.

GOOD FAITH OF LOCATOR.

Oil locations under the placer mining laws can not be sustained as valid locations where one person used names of others in an attempt to secure for himself an area of mineral land in excess of that allowed by law. The fact that the notices and all matters in

connection with the locations were prepared, initiated, and attended to by the person interested without previous authority from the persons whose names were used; that immediately after posting the notices the interested person began dealing with the property as his own without the knowledge of the locators named and without obtaining authority from them and without advising them of his intention or purpose; that after entering into a contract with an operating company for the development of the claims, he requested the execution of powers of attorney prepared by him and they were accordingly executed; that subsequently the several parties executed deeds to such interested person for nominal considerations, fixed by the interested person himself, clearly show that the person interested did not act in good faith for the benefit of the alleged locators, but was attempting to acquire the ground for himself.

United States *v.* Brookshire Oil Co., 242 Federal, 718, p. 720.

PARTY IN POSSESSION—CLAIM TO PROTECTION.

A person or corporation in possession of an oil claim as the representative, agent, or contractee of the original locator can not claim protection under the act of June 25, 1910, known as the Pickett Act (36 Stat., 847), as against a withdrawal order, where the locations were not made in good faith by the original locator and were in fact invalid.

United States *v.* Brookshire Oil Co., 242 Federal, 718, p. 722.

See United States *v.* North American Oil, Consolidated, 242 Federal, 723.

DISCOVERY—SEEPAGE.

While it is possible that at times oil may be found issuing from the surface of the ground, known in practice as seepage, in which case discovery may be made without difficulty or expense, it is a matter of common knowledge that almost always drilling is essential to such discovery, and in many sections drilling to great depth, involving heavy cost.

Consolidated Mutual Oil Co. *v.* United States, 245 Federal, 521, p. 525.

DISCOVERY—DILIGENT PROSECUTION OF WORK—WITHDRAWAL ORDER.

The original locator of oil lands on the public domain by a lease dated June 25, 1909, leased the locations, including in all two 80-acre tracts and two 160-acre tracts of a certain section of land. The lessee immediately entered into the exclusive possession of all the lands included in the lease. The lease upon a royalty basis provided for the drilling of wells upon each of the quarter sections embraced by the lease, in the effort to discover and take oil therefrom, for

continuous and diligent work by the lessee to that end, and for the working of all the claims as a unit. Between the date of the lease and September 27, 1909, the lessee built a 2-inch pipe line more than 3 miles in length to connect with the main of a water supply company, constructed a standard derrick on each of the claims, built on one quarter of the section a water tank with pipe-line connections, a bunk house and a cookhouse containing a dining room sufficient for the seating of 40 men, a kitchen, and bedroom. On another quarter section the lessee built another bunk house 20 by 30 feet in size; and on another section the lessee built a stabling yard for freight teams and for a buggy and horses, building also a boiler house and erecting machinery for operating one full string of tools for drilling at the derrick on one quarter section. On the 27th day of September, 1909, the lessee was in the undisputed possession of all the property and was actually drilling a well by means of a derrick on one quarter that had reached the depth of 830 feet. The lessee had abundant means to carry out his undertaking, and but for the impossibility of securing the necessary water would have been sinking a well at each of the derricks on the other quarters of the section. The lessee intended and in fact had directed the successive sinking of the other wells as soon as oil should be struck in the first one and was so intent on the speeding of the work as to offer to pay a bonus to the employees for extra work. Up to the 27th day of September there had been no discovery of oil or any other mineral on any of the land and on that date the President by proclamation and a withdrawal order withdrew from location many tracts of land, including those covered by the lease. At the time of the withdrawal order the lessee had in the lands in question valuable rights of possession and conveyance which the courts would protect and enforce and consequently valid rights that he had acquired by the license, if not by the invitation of the Government, and in pursuance of which the lessee had expended more than \$20,000 and which he continued diligently to explore and develop at very large additional expense for years thereafter without objection on the part of the Government. Subsequently an assignee of the lessee was permitted, upon due application to the Land Office, to enter the lands described in the lease and for which he paid the Government \$1,600, receiving therefor its register's final certificate of entry dated October 31, 1914, and which certificate remains uncanceled. Under the facts and circumstances the lessee was in diligent prosecution of work leading to a discovery within the meaning of the act of June 25, 1910 (36 Stat., 847), and his rights were not affected and his title not forfeited by the President's withdrawal order.

PERSONS PROSECUTING WORK OF DISCOVERY — PROTECTION.

The act of June 25, 1910 (36 Stats., 817), known as the Pickett Act, was intended and designed for the benefit of those who were intending at the date of the withdrawal to acquire title or right of possession to mining ground by complying in good faith with the mining laws of the United States. The act can not be extended to protect a person, his representative or agent, who is seeking to evade the mining laws and obtain title in violation thereof.

United States *v.* Brookshire Oil Co., 242 Federal, 718, p. 722.

See United States *v.* North American Oil, Consolidated, 242 Federal, 723.

PROTECTION AGAINST WITHDRAWAL ORDER.

To bring an occupant or claimant of an oil claim within the provisions of the Pickett Act, the law does not require any unusual or extraordinary effort, but only that which is usual, ordinary, and reasonable under the circumstances. The law does not require a vain or useless thing to be done and an oil company in possession of an oil location at the time of a withdrawal order was not required by the law of diligence to have installed all of its machinery, or commence drilling before a supply of water was such that it could reasonably hope to successfully continue the work, nor is it required to make any unusual or extraordinary effort to obtain water, but only such as was reasonable under the circumstances confronting it. It is sufficient if the company is in diligent prosecution of work leading to discovery at the date of a withdrawal order.

United States *v.* North American Oil, Consolidated, 242 Federal, 723, p. 727.

LOCATOR PROTECTED AGAINST WITHDRAWAL ORDER.

To bring an occupant or claimant of oil or gas bearing lands within the provisions of the act of June 25, 1910 (36 Stats., 847), known as the Pickett Act, it is not necessary that such locator was engaged in actual drilling for oil or gas on a particular tract of land at the date of a withdrawal order, or necessarily that work was then being performed upon the identical claim upon which discovery ultimately must be made in order to make location. It is sufficient if reasonable effort was being made at that time indicating a bona fide intention to complete the work of discovery on the particular claim with all practical expedition. This intention may be manifested by the doing of physical acts which have a direct tendency to facilitate the exploration for a discovery of oil or gas thereon, although actual drilling had not commenced and the work done may not have been on such claim.

United States *v.* North American Oil, Consolidated, 242 Federal, 723, p. 727.

OCCUPANT PROTECTED AGAINST WITHDRAWAL ORDER.

The act of Congress of June 25, 1910 (36 Stat., 847), provided that the rights of a bona fide occupant or claimant of oil-bearing lands who at the date of a withdrawal order was in diligent prosecution of work leading to a discovery of oil should not be affected by such order, was the first legislative recognition ever made by Congress of any right on the part of an occupant or claimant of oil-bearing lands prior to a discovery of oil thereon. By this act, which is remedial and is to be liberally construed, Congress expressly gave to a good faith occupant or claimant of oil or gas bearing lands, who at the date of the act was in diligent prosecution of work leading to discovery of oil or gas, a status. The locator of an oil claim, his assignee or lessee who at the time of the passage of the act was in the actual and exclusive possession of certain oil locations and was in diligent prosecution of work on one of a group of contiguous claims for the benefit of all, not exceeding five, in an effort to discover oil thereon, and which continuous work resulted in the discovery of oil in each of the quarter sections, and who continued from the date of the passage of the act in diligent prosecution of the work that did lead to such discovery, is within the express provisions of the act.

Consolidated Mutual Oil Co. v. United States, 245 Federal, 521, p. 527.

EFFECT OF WITHDRAWAL ORDER.

The President's proclamation and withdrawal order of September 27, 1909, provided that all mining locations or claims existing or valid on that date might proceed to entry in the usual manner after field investigation and examination. This proviso was intended to apply to lands upon which discovery was already made and to which locators had already acquired an equitable title, and it was also intended to apply to all locations and claims existing at the time of the making of the withdrawal order to which the locators or claimants had some valid rights. Under this proviso a locator, his assignee or lessee, who had made a valid location and was in the actual work of drilling an oil well and had reached a depth of 830 feet had valuable rights of possession and conveyance which the courts would protect and enforce, rights acquired by the license, if not by the invitation of the Government, and who pursuant thereto had expended more than \$20,000 upon the land, and who thereafter continued diligently to explore and develop and discover and produce oil, was clearly within the proviso of the withdrawal order.

Consolidated Mutual Oil Co. v. United States, 245 Federal, 521, p. 527.

PROTECTION AGAINST WITHDRAWALS—CONTINUOUS PROSECUTION OF WORK.

The act of June 25, 1910, known as the Pickett Act (36 Stats., 847), provides that the right of a bona fide occupant or claimant at the date of a withdrawal order, who was at such time in diligent prosecution of work leading to discovery, shall not be impaired or affected so long as such occupant or claimant shall continue in diligent prosecution of the work—that is, work leading to discovery; but this does not imply that when discovery is made, his right shall no longer continue. On the contrary it means that he may continue the prosecution of the work until a discovery is made and this completes his right to the location under the placer mining laws.

United States v. North American Oil, Consolidated, 242 Federal, 723, p. 728.

United States v. Thirty-two Oil Co., 242 Federal, 730.

WITHDRAWAL ORDER—CLAIMANTS PROTECTED.

The act of Congress of June 25, 1910 (36 Stats., 847), known as the Pickett Act, is a congressional modification of a withdrawal order by relieving therefrom all lands included therein occupied or claimed by bona fide occupants or claimants at the date of such order who were then in diligent prosecution of work leading to discovery, so far as the rights of such occupant or claimant were concerned, and as to them the matter stood as if the land had never been withdrawn but remained subject to the disposition of the Land Department.

United States v. Record Oil Co., 242 Federal, 746, p. 749.

United States v. Consolidated Mutual Oil Co., 242 Federal, 746, p. 749.

United States v. Caribou Oil Mining Co., 242 Federal, 746, p. 749.

DILIGENT PROSECUTION OF WORK BEFORE DISCOVERY—WITHDRAWAL ORDER.

Oil locations are authorized to be made under the placer mining laws. Under the United States statutes providing for the location of placer claims such a claim is not perfected and the claimant's right absolute until a discovery of minerals is made. The rule necessarily applies to oil locations. But some considerable time and a comparatively large expense were necessarily involved in making a discovery of oil on the location. Great injustice was done to locators who had made large investments in discovery work where the lands were withdrawn after such investment had been made but before a discovery was effected. To prevent this injustice, Congress passed an act on June 25, 1910 (36 Stats., 847), known as the Pickett Act. This act provided in effect that locators in the diligent prosecution of work looking to a discovery should not be deprived of their rights by a withdrawal order if the work was so diligently prosecuted until a

discovery was made. The statute contemplates that the diligent prosecution of the work shall continue after any such withdrawal order and that it must be continuous until a discovery is made. But where an oil claimant was in diligent prosecution leading to a discovery at the time of a withdrawal order and continued the same after the withdrawal order and finally made a discovery after an investment of a very large sum, the Government can not then forfeit his right and deprive him of his title to the location because he was not as diligent in the prosecution of the work after the withdrawal order as he might have been and as the officers of the Government thought he should have been.

United States v. North American Oil, Consolidated, 242 Federal, 723, p. 728.

DILIGENT PROSECUTION OF WORK—WHAT CONSTITUTES.

An oil claimant is in the diligent prosecution of work leading to a discovery within the meaning of the Pickett Act where prior to the date of a withdrawal order the location had been properly made under the United States mining laws and the oil company, with the intention of exploring the property for a discovery of oil, took possession of the claim and purchased the necessary material and caused to be constructed a derrick and a building or buildings for the housing and accommodation of its employees and such as were common in the oil fields and necessary for such purposes. Two boilers had been purchased and transported to the property ready to be set. Thereafter, up to and at the time of the withdrawal order, employees of the oil company were on each quarter section as keepers, digging cellars, clearing up sagebrush, and doing other preparatory work. Tools had not been hung in the derricks or the boilers set because the oil company had been unable to obtain assurances of an adequate supply of water for boiler and drilling purposes. Large quantities of water are required to drill an oil well and a dependable supply is necessary, not only for use in the boilers but in the well itself for drilling. The oil company was compelled to wait until a water supply company enlarged its plant by sinking new wells, laying additional mains, and installing new machinery and held out the reasonable hope and promise that it would soon be able to furnish an adequate supply of water. The oil company did not commence drilling, but intended to do so and did do so as soon as water could be secured, and in the mean time remained in possession of each quarter section with keepers or watchmen in charge, the employees doing more or less work. Subsequently and after a supply of water was obtained drilling was begun, a discovery made, and numerous wells drilled and oil in commercial quantities discovered on each quarter section.

United States v. North American Oil, Consolidated, 242 Federal, 723, p. 725.

United States v. Thirty-two Oil Co., 242 Federal, 730, p. 732.

WITHDRAWAL ORDER—DILIGENT PROSECUTION OF WORK QUESTION OF FACT.

Whether an occupant or claimant of oil or gas bearing land at the date of a withdrawal order was at that time engaged in diligent prosecution of work leading to discovery is a question of fact and no hard or fast rule applicable to all cases can be laid down by which it can be determined. Each case must depend to a large extent upon its own facts and circumstances.

United States v. Thirty-two Oil Co., 242 Federal, 730, p. 735.

DILIGENT PROSECUTION OF WORK—NATURE OF WORK.

In order to constitute diligent prosecution of work to bring an oil locator or claimant within the provisions of the Pickett Act, it is not necessary that the work being performed at the time of a withdrawal order was on the particular tract in controversy; but before it can be deemed work leading to discovery thereon, it must be presently and purposely designed for that purpose. The drilling of a well on one location would not, however long continued, lead to discovery of oil on another location. It might afford evidence of the probable existence of oil on the other location and justify the expenditure of money in exploring it and, by disclosing the formation, materially aid in subsequent drilling and lessen the expenses. But this result would follow whether the well was drilled by the occupant or claimant of the particular tract or by a third person, and such work on one location or claim can not be held to be work leading to discovery on another. The proviso in the Pickett Act was intended to confer upon persons occupying or claiming in good faith at the time of a withdrawal order of public land within the withdrawn area, and with the bona fide intention of complying with the mining laws and who were at such time in diligent prosecution of work leading to discovery thereon, the right to continue such work if discovery was subsequently made and the right to retain possession and extract the oil, or take title by patent, the same as if the land had not been withdrawn.

United States v. Thirty-two Oil Co., 242 Federal, 730, p. 735.

WITHDRAWAL ORDER—DILIGENT PROSECUTION OF WORK—NATURE AND PLACE OF WORK.

The diligent prosecution of work may be in progress within the meaning of the Pickett Act at the date of a withdrawal order on one of a group of locations, or even extraterritorially to any of them which could properly be held to be work leading to discovery on all such claims, as the building of roads, laying of water mains, estab-

lishing camps, or assembling material and equipment. if such work directly tended to and was purposely designed for the development of each location with all practical expedition.

United States v. Thirty-two Oil Co., 242 Federal, 730, p. 736.

United States v. Stockton Midway Oil Co., 240 Federal, 1006, p. 1012.

ASSESSMENT WORK ON GROUP CLAIMS.

The rule as to group improvement or development or assessment work as authorized by the United States mining statutes has no application to oil locations and to the diligent prosecution of work on an oil claim at the time of a withdrawal order. The Pickett Act was designed for the relief of bona fide occupants or claimants at the date of a withdrawal order who had not but were then intending in good faith to make a discovery and were manifesting such intention by the diligent prosecution of work tending thereto. But the provisions of this act can not be claimed by or extended to a person holding under paper locations, or locations made for the purpose of enabling one party to acquire a larger area of mineral land by one discovery than the law permits him to take or by one who had by means of skeleton derricks, cabins, or by so-called assessment work, was endeavoring to hold oil lands temporarily for speculation or until exploratory work on adjoining land owned or occupied by him or in the vicinity had indicated the oil or nonoil bearing quality of the land.

United States v. Thirty-two Oil Co., 242 Federal, 730, p. 736.

APPLICATION FOR PATENT—FINAL CERTIFICATE.

A final certificate issued by the General Land Office on an application for a patent to an oil claim vests the entryman with an equitable title to the land and a prima facie right to a patent, but this title is subject to the jurisdiction of the Land Department and for proper cause, may be canceled. It may also be canceled and set aside for fraud by a court in a proper suit brought by the Government for that purpose; but until the entry is lawfully canceled the entryman is in possession under an equitable title and the questions held and determined by the Land Department can not be again litigated in a suit by the United States to enjoin the claimant from mining and removing oil from his location and to require an accounting for oil taken.

United States v. Record Oil Co., 242 Federal, 746, p. 748.

United States v. Consolidated Mutual Oil Co., 242 Federal, 746, p. 748.

United States v. Caribou Oil Mining Co., 242 Federal, 746, p. 748.

TRESPASS AND WASTE—INJUNCTION—PARTIES.

In an action by the United States to enjoin and restrain parties in possession of certain invalid oil locations from trespassing thereon and from producing and extracting oil therefrom, marketing companies that purchased the oil from the trespasser and removed it from the premises through their own pipe lines, are not proper parties, where the basis for a court of equity's jurisdiction was the prevention of waste, and where such purchasing companies made no claim of title to or interest in the land.

United States *v.* Brookshire Oil Co., 242 Federal, 718, p. 722.

See United States *v.* Midway Northern Oil Co., 232 Federal, 619.

MINING PARTNERSHIPS.

AGREEMENT CONSTITUTING PARTNERSHIPS.

An agreement between two or more persons to get together and consolidate into one body or into several bodies small holdings of coal in place so as to make them marketable and to dispose of the same and to share the burden and advantages equally is more than a joint adventure. Such an agreement does not contemplate a single transaction but numerous transactions necessarily extending over a considerable period of time. Though it involves a joint interest and a joint adventure, it is a working contract in which capital, enterprise, and labor are combined for the achievement of profitable results. In such an agreement all of the essential legal elements of a partnership are found, and it does not matter that in the execution of the agreement subsidiary or auxiliary agreements must be made for inclusion and exclusion of subjects, as these are incidents of all partnerships that are formed for the purpose of trade or prosecution of industrial enterprises, and this feature of an agreement to buy and sell coal lands does not deprive it of the elements of a partnership contract.

Teter v. Moore (West Virginia), 93 Southeastern, 342, p. 348.

RIGHT OF PARTNER TO SUE AT LAW.

The complainant and defendant entered into an agreement to mine ore under a certain lease entered into with a mining company in the name of the complainant himself. By the agreement the complainant agreed to pay two-thirds of the expense incurred in mining the ore and the defendant agreed to pay one-third thereof, and the net proceeds derived from the ore mined were to be divided between the partners in that proportion. By the terms of the lease the mining company was to ship to market all the ore as mined and retain title thereto until the royalties under the lease were paid. Pursuant to the agreement, ore was mined and sold and on settlement the mining company paid the defendant the balance due the partners under the lease. On refusing to account, the plaintiff sued the defendant for two-thirds of the amount so received by him from the mining company. Ordinarily one partner can not sue another at law to recover an alleged share of the proceeds of the partnership business. But where a partnership is limited to a single venture and where there are no firm liabilities outstanding and there is nothing requiring an accounting in equity,

an action at law may be maintained by one partner to recover his share of the proceeds of the partnership business. If there is any reason why the suing partner should not prevail in such an action, it is the duty of the defendant to plead it as a defense to the action.

Miller v. Gray (Utah), 167 Pacific, 358.

RECOVERY BY ONE PARTNER—VIOLATION OF MORAL OBLIGATIONS AS A DEFENSE.

In an action by one partner against another to recover a balance due from a mining venture carried on under a lease from a mining corporation, the defendant partner, who had received the proceeds of a sale of ore, refused to account and retained the proceeds of the ore, can not defend the action on the ground that the complainant was an employee of the mining company and that in accepting the lease from the company and in carrying on the mining operations he violated a rule of the company by which its employees should not be interested in any leases covering any of the company's workings and thereby violated a moral obligation existing between an employee and his employer. There is no principle of law or rule of morals by which a defendant under such circumstances is entitled to appropriate his partner's money because the partner might have violated some rule of his employer, the mining company. That fact does not give the defendant any right to claim the money paid to him by the mining company itself with a knowledge of all the facts. The rule against public policy has never been so applied as to take property or money from one person to give it to another merely because one of them may not in all things have lived up to the moral code. Courts enforce legal rights as contradistinguished from moral obligations, and where the two unite in the same person both are enforced; but where the legal right is in one against whom the moral obligation is asserted, legal right prevails.

Miller v. Gray (Utah), 167 Pacific, 358.

OPTION CONTRACTS FOR COAL.

A written contract providing for procurement of options on coal in place by one of the parties thereto for the mutual and equal benefit of both and for equality of burden as to expenses and advantages as to profits, under which large areas of coal are purchased and disposed of for profit, constitutes a partnership agreement.

Teter v. Moore (West Virginia), 93 Southeastern, 342, p. 348.

EXTENT OF OPERATIONS.

A partnership agreement specified certain territories for procurement of options on coal in place and specified certain territories in which the enterprise was to be conducted, but with an indefinite

maximum of coal to be optioned. The actual operations conducted by the parties went far beyond the territories expressly mentioned in the agreement, and the coal purchased outside of such territories was naturally in the same way as that contemplated by the agreement. It was consolidated in the same manner by the same character of hazard, labor, and expense, sold to the same party at about the same time and the proceeds included in a statement of resources and liabilities with a summary of the total amount of business done. The same office, office furniture, and clerical help were used, and the records of these outside transactions were kept in the same set of books. These outside and additional transactions must be treated as a part of the partnership affairs and an addition to the written agreement may be inferred by the bringing in of the new subjects and treatment or disposition thereof on the basis of the written agreement.

Teter v. Moore (West Virginia), 93 Southeastern, 342, p. 349.

SETTLEMENTS OF ACCOUNTS—STATUTE OF LIMITATIONS.

A partnership was engaged extensively in the procurement of options on coal in place and in the sale of such option agreements as well as in the sale of the coal itself. The statute of limitations does not run against the unsettled parts of the accounts of partnership accounts. A continuing partnership contract is not subject to the operation of the statute of limitations until it has been completed. But as to matters included in a partnership settlement and as to any settlement made by the partners, the statute of limitations runs from the date of such settlement and bars any item or matter included therein after five years, whether affected or induced by either fraud or mistake. To reach such a matter either at law or equity there must be an allegation and proof of facts sufficient in law to bring it within the exception provided by the statute of West Virginia (Code, sec. 4431).

Teter v. Moore (West Virginia), 93 Southeastern, 342, p. 349.

PARTNERSHIP SETTLEMENT—FRAUD AND CONCEALMENT—STATUTE OF LIMITATIONS—PLEADING.

A bill by the administrator of a deceased partner of a partnership engaged in the purchase and sale of coal in place alleged that the defendant, the surviving partner, was the custodian of the books of the firm; that he had the custody of the social property and funds with authority to incur and make expenses; that he made and caused to be made entries in the books of large sums of money as having been paid out for expenses which were never actually paid and for payment of which there was no obligation on the part of the firm; that the deceased partner, relying upon the honesty and integ-

rity of his partner, made no investigation of the books for verification of the settlement and did not suspect the existence of the alleged frauds; and that the defendant procured a settlement with the deceased partner and left in his hands the sums of money so wrongfully charged as secret, wrongful, and clandestine profits. It was not necessary for the bill to charge that the defendant fraudulently concealed the cause of action in order to prevent it from being barred by the statute of limitations, as fraudulent entries of the kind alleged made by a partner having authority to keep the books and pay expenses and charge the same naturally conceal themselves, and allegation and proof thereof make out a cause within the statutory exception. It was the partner's duty when clothed with such power and as a trustee to make full and truthful disclosure of every fact in his knowledge necessary to a full, fair, and honest settlement.

Teter v. Moore (West Virginia), 93 Southeastern, 342, p. 350.

STATUTES RELATING TO MINING OPERATIONS.

CONSTRUCTION, VALIDITY, AND EFFECT.

CONSTITUTIONALITY NOT DETERMINED.

A court will not consider and determine the constitutionality of a statute at the suit of a stockholder of a mining corporation, in which he claims the statute is unconstitutional, where at the same time the stockholder is asserting some right and claiming protection by virtue of the same statute.

Wall v. Parrot Silver & Copper Co., 244 U. S., 407, p. 409.

Woodruff v. Producers' Oil Co., 142 Louisiana, 76 Southern, 803, p. 804.

FELLOW SERVANTS—PERSONS NOT IN SAME GRADE OF SERVICE.

Section 1343 of the statute of Utah (Comp. Laws, 1907) provides that all persons engaged in the service of a common employer and who are in the same grade of service and working together at the same time and place and to a common purpose are fellow servants. Under this section of the statute two miners working on different levels in a mine, although they work to a "common purpose," do not necessarily work "together at the same time and place" and are not fellow servants within the meaning of this section of the statute.

Shields v. Silver King Coalition Mines Co. (Utah), 166 Pacific, 988.

DUTIES IMPOSED ON OPERATOR.

DUTY TO EMPLOY MINE FOREMAN—DUTY OF FOREMAN TO DEVOTE FULL TIME.

The laws of Oklahoma (Rev. Laws, 1910, sec. 3983) require every coal-mine operator to employ a competent and practical inside overseer, called mine foreman, who shall have charge of the inside operations of the mine and shall see that the provisions of the law are strictly enforced. The statute also requires the mine foreman to devote the whole of his time to his duties in the mine when in operation. The statute merely prescribes the minimum duty cast upon the foreman and in no wise limits or modifies the plain meaning of the positive language used in other parts of the statute. The requirement that he shall devote the whole of his time to his duties in the mine means his statutory duties, which require him always to keep a careful watch over the timbering and as far as possible see that as the miners advance their excavations all slate and rock overhead shall be taken down or secured against falling, and constantly to see that every working place is properly secured by props

or timbers, and that no persons shall be permitted to work in an unsafe place except for the purpose of making it safe. The mandatory character of these statutory directions is emphasized by other provisions of the statute. By express provision of the statute and by all the duties imposed upon the mine foreman he is required to devote his whole time to his duties in a mine when in operation.

Oklahoma Coal Co. v. Corrigan (Oklahoma), 168 Pacific, 1024, p. 1025.

VENTILATION—MINE FREE FROM GAS—STANDARD OF DUTY.

For the better protection of the health and lives of men engaged in the dangerous work of mining coal, the legislature, by statute both remedial and penal, have seen proper to prescribe such regulations and conditions under which a mine may be lawfully operated, and one of these conditions is that "all working places shall be kept clear of standing gas." The standard of duty thus defined and imposed upon the operator of a mine in all circumstances is made the criterion of his care for the safety of his employees; his obligation to meet all the statutory requirements is imperative; and neglect so to do, if resulting in an injury to a miner, will in the absence of contributory negligence, render the operator pecuniarily liable.

McAlester-Edwards Coal Co. v. Hoffer (Oklahoma), 166 Pacific, 740, p. 741.

DUTY AS TO LIGHTS ON COAL CARS.

The Virginia statute (Mining Act, 1916) requires the mine foreman to carry a conspicuous light on the front and a light or flag on the rear of every trip or train of cars when in motion; but the provision does not apply to trips being hauled by gathering trams or by mules when coal is being gathered on other than main headings. It was a clear violation of this law and such as to render a mine operator liable where a trip of empty cars was pushed through an entry in a mine and at the same time a trip of loaded cars was pushed through the entry in an opposite direction and the trip of loaded cars had no light attached to the front end of the front car and where miners were required to pass through the entry to and from their work. A miner injured by being struck by the trip of loaded cars without warning and in a place in the entry where it was too dark to see is entitled to recover damages for the injuries so received.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 371.

INSPECTION OF GASEOUS MINE—QUESTION OF FACT.

The statute of Utah (Laws, 1913, p. 122) requires that a mine foreman or fire boss in all mines known to generate explosive gases shall make a careful examination every morning of all places which might endanger the safety of the miners within three hours prior to

the time they shall enter the mine. Whether or not a particular mine was one which was known to generate explosive gases is a question of fact. But where there was no dispute respecting the fact, and where the evidence on the subject that a certain mine generated gas is not contradicted, it is not error for a court to declare the fact to be in accordance with the undisputed evidence. Where a finding with respect to any essential fact must necessarily be in the affirmative, it is ordinarily the duty of the court to declare the fact, and not permit the jury to assume that they may find the fact contrary to the undisputed evidence.

Eleganti v. Standard Coal Co. (Utah), 168 Pacific, 266.

MINES KNOWN TO GENERATE GAS—MEANING.

The wording of the statute is that "in all mines known to generate explosive gases" examination and inspection shall be made as required by the statute. The statute was intended to and does apply to all mines where explosive gases are known to exist, regardless of the quantity thereof. The legislature by the statute withdrew the question respecting the quantity of gas, or whether the quantity was sufficient or otherwise from the judgment of all persons, whether experts or nonexperts, and imposed upon the owner or operator the duty of examination and inspection in all mines where explosive gases in any quantity are known to exist. It is not a question of whether there is explosive gas in the mine in sufficient quantities to make the mine unsafe or dangerous, but the only question that can be considered is: Has explosive gas been discovered in the mine? If it has, the mine is necessarily one which is known to generate explosive gases. If explosive gases are found in a mine, then it is known to exist, and there is no alternative save to follow the requirement of the statute as to examination and inspection.

Eleganti v. Standard Coal Co. (Utah), 168 Pacific, 266.

CONTINUOUS INSPECTION REQUIRED.

Explosive gases were discovered in a mine and were dissipated in the usual way, and the statutory examination and inspection were kept up for some weeks and later discontinued for the reason that no more gases were discovered. Some sixty days after the first gas was discovered and some weeks after the examination and inspection had been suspended a miner was killed by an explosion of gas in the mine. Had the examination and inspection continued it was reasonably certain that the gas which caused the explosion resulting in the death of the miner would have been discovered and the explosion prevented. The duty of a continued examination and inspection is imposed by the statute for the express purpose of obviating the

every condition that arose in the instant case. It is sufficient to bring a mine within the statute if explosive gases were discovered on one occasion, and then the statutory examination and inspection must be continuous thereafter to avoid liability on the part of the operator.

Eleganti v. Standard Coal Co. (Utah), 168 Pacific, 266.

VIOLATION OF DUTY TO INSPECT.

The statutes of Oklahoma as to the duties of a mine foreman, when considered together, impose upon the mine foreman the duty of inspecting working places and entries before entering such places for the purpose of measuring the gobwork; and his failure to do so constitutes a violation of the statute.

Oklahoma Coal Co. v. Corrigan (Oklahoma), 168 Pacific, 1024, p. 1025.

PROPS—APPLICATION OF STATUTE.

The duty to remove loose, overhanging coal, slate, or rock where it is impossible or impractical to prop the roof is required of the operator by statute in travel and air ways, but this provision of the statute can not be extended by construction to include a miner's working place.

Peacock Coal Min. Co. v. Crawford (Indiana Appeals), 117 Northeastern, 504, p. 505.

LIABILITY FOR FAILURE TO FURNISH PROPS—PLEADING.

The duty imposed upon a miner by the Kentucky statute (Stats., 1909, sec. 2739b, subsec. 7) of selecting and marking props desired by him is dependent upon the operator having provided them in a proper place either within the mine or conveniently near thereto. In an action for the death of a miner, caused by the alleged failure of the operator to provide props in a proper place, the complainant is not required to allege a selection and marking by the deceased miner, unless it was made to appear that the props were provided by the mine operator. Allegations in the petition that the mine operator negligently failed to furnish props, and violated his statutory duty in reference to furnishing props, are sufficient to cover every necessary step in furnishing the props and necessarily included the prior duty of providing them. A failure to furnish props must necessarily result from the failure to provide them.

Thacker v. Shelby Coal Min. Co. (Kentucky), 197 Southwestern, 633, p. 634.

FAILURE TO FURNISH PROPS—REQUEST BY MINER.

The statute of Kentucky (sec. 2739b, subsec. 7, Stats. 1909), imposes upon the mine operator the duty of furnishing props to a miner; but the miner is first required to select and mark the props

he desires from a supply to be maintained by the mine operator in the mine or within a reasonable distance therefrom. If the mine operator does not supply the props at a place in the mine or within a reasonable distance therefrom, so that they can be conveniently reached by the miners, then a miner is not required to select and mark the props desired; but under such circumstances a request or demand by the miner will be sufficient to impose upon the operator the duty of furnishing the props. The statute requiring the miner to select and mark the props does not apply and is not controlling where the operator himself has failed to place a supply of props within the mine or within a reasonable distance therefrom.

Thacker v. Shelby Coal Min. Co. (Kentucky), 197 Southwestern, 633, p. 634.

VIOLATION BY OPERATOR.

NEGLIGENCE PER SE.

Where a legislature of a State, having in view the promotion of the safety of the public or of individual members of the public, commands or forbids the doing of a particular act, the failure to do the act commanded or the doing of the act prohibited is negligence as a matter of law, otherwise called negligence per se. This rule obtains, irrespective of the question of the exercise of prudence, diligence, care, or skill and if it is the proximate cause of hurt or damages to another and if such other person is without contributory fault, the case must be decided in his favor and all that remains to be done is to assess his damages.

Oklahoma Coal Co. v. Corrigan (Oklahoma), 168 Pacific, 1024, p. 1027.

Generally the violation of a public duty enjoined by law for the protection of persons or property constitutes negligence per se.

McAlester-Edwards Coal Co. v. Hoffer (Oklahoma), 166 Pacific, 740, p. 741.

NOT PROXIMATE CAUSE OF DEATH OF MINER.

The statute of Illinois (Hurd's Revised Statutes, chap. 93), requires a mine operator in case of any accident to the ventilation immediately to have all the workmen come out of the mine and not to send anyone in until the ventilation is restored. The fact that a mine operator violated the statute by sending, after an explosion, a man into the mine to search for an assistant mine manager who had himself gone into the mine after the explosion, can not render the mine operator liable for the death of the miner so sent into the mine, where the operator subsequently by telephone called the miner and on his answering informed him that the assistant mine manager had come out of the mine and thereupon directed and positively ordered him to come back out of the mine, and where in violation of such order and with knowledge of the dangerous condi-

tion of the mine, the miner proceeded into the dangerous part of the mine and lost his life by being overcome by gas.

Randall v. Crescent Coal Co. (Illinois), 117 Northeastern, 723, p. 776.

RIGHT OF ACTION.

Any person of a particular class for whose special benefit a penal statute is enacted has a right of action for injuries resulting to him from its violation. Under this rule the Virginia statute requiring mine operators to carry a light on the front or rear of coal cars, gives a miner a right of action against the operator for injuries received because of the violation of the statute in failing to properly light a trip of cars.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 371.

FAILURE TO INSPECT MINE—LIABILITY.

In an action by a miner for injuries caused by an explosion of gas, the evidence showed that the injured miner was employed as a shot firer and as he went in the discharge of his duty in a certain part of the mine he encountered standing gas that was ignited and caused to explode by a lamp carried by him, resulting in the injuries complained of. The mine operator employed a fire boss or gas man to inspect the mine for the purpose of ascertaining whether gas had accumulated therein and to report the same and by signs and markings warn the miners of the presence of gas. The inspector entered the mine, as was his custom, at 3.30 a. m. and remained until 11.30 in the performance of such duties and on the day of the explosion his inspection made at 5 o'clock in the morning showed the place to be free of gas. The statute expressly provides that the operator of every coal mine shall provide and maintain ample means of ventilation, affording not less than 150 cubic feet of air per minute for each person employed in the mine, and that the ventilation shall be conducted through the main crossings, entries, and all working places so as to dilute and render harmless and expel therefrom the noxious and poisonous gases and all working places shall be kept clear of standing gas. The statute does not give the mine operator the privilege of reasoning on the sufficiency of appliances for ventilation or leave to his judgment the amount of ventilation that is sufficient for the protection of miners. It expressly provides that all working places shall be kept clear of standing gas. This is an imperative duty and the consequence of neglecting it can not be excused because some workmen may disregard instructions. The statute has prescribed this duty and it can not be omitted and the lives of miners committed to the chance that the care or duty of some one else will counteract the neglect and disregard of the legislative mandate.

McAlester-Edwards Coal Co. v. Hoffar (Oklahoma), 166 Pacific, 740.

FAILURE TO LIGHT CARS—LIABILITY.

The statute of Illinois (Hurd's Rev. Stats., 1913, chap. 93, sec. 15), requires a mine operator to keep a conspicuous white light on the front and a conspicuous red light or white signal board on the rear of every trip or train of cars run by machinery within the mine. A bottom boss was injured while taking some empty cars through a passageway by being run into by an electric motor that was equipped with a 16-candlepower incandescent electric light upon the motor about 2 feet above the rail and which did not give very much light in front of the motor. In an action by the bottom boss for damages for injuries caused by the collision it was a question of fact for the jury to determine whether the 16-candlepower incandescent electric light was a compliance with the statute requiring a "conspicuous white light."

Daly v. New Staunton Coal Co. (Illinois), 117 Northeastern, 413, p. 416.

FAILURE TO CARRY LIGHT ON CARS—PROXIMATE CAUSE OF INJURY.

The failure of a mine operator to carry a light on the front car of a trip of loaded cars being pushed through a dark entry must be regarded as the proximate cause of an injury to a miner who while passing through the entry at a dark place was struck and injured by the trip of loaded cars.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 371.

FAILURE TO POST RULES—PROXIMATE CAUSE OF DEATH.

The fact that a mine operator failed to promulgate and post rules governing the operations of the mine as required by the statute is immaterial in an action for damages for the death of a miner where the failure to post the rules was not the proximate cause of the miner's death.

Randall v. Crescent Coal Co. (Illinois), 117 Northeastern, 773, p. 776.

FAILURE TO VENTILATE—PROXIMATE CAUSE OF MINER'S DEATH.

The statute of Illinois (Hurd's Revised Statutes, 1915-16, chap. 93, sec. 20), makes it the duty of a mine manager in case of accident by which the ventilation is stopped or obstructed at once to order the withdrawal of all men from the mine and to prohibit their return until the ventilation is restored. The fact that a managing stockholder violated the statute by sending a miner into the mine shortly after an explosion to search for an assistant mine manager and another miner who had gone into the mine to make some investigations, can not be regarded as the proximate cause of the miner's death where later the managing stockholder called the miner while in the mine by telephone and was answered by the miner and then ordered and directed the miner to come out of the mine, informing him that the assistant mine manager and the other miner had returned out of

the mine, and where the miner answered, "All right"; but where the miner with knowledge of the condition of the mine disobeyed the order and went into the dangerous part of the mine where gas had accumulated and was overcome and lost his life.

Randall v. Crescent Coal Co. (Illinois), 117 Northeastern, 773, p. 775.

SAFE WORKING PLACE.

LIABILITY FOR FAILURE.

The statute of Oklahoma imposed upon a mine operator the duty to furnish an employee or miner a reasonably safe place in which to perform his work. This duty ordinarily is absolute and a failure on the part of a mine operator to discharge it constitutes primary negligence; but such a duty is not owing to a foreman employed by the operator and in charge of the work with full authority and charged with the duty of doing all things necessary to make the working place reasonably safe. Whether the person employed was a foreman and was within the exception or whether he was a mere timekeeper and it was not his duty to look after the work of making places safe, are questions of fact and it is for a jury to say what was the real character and nature of the employment and what were his duties at the time of this alleged injury.

Sandals v. Mizpah Min. Co. (Oklahoma), 168 Pacific, 803.

DUTY IMPOSED ON MINER.

KNOWLEDGE OF DEFECTS—DUTY TO INFORM OPERATOR—EXCUSE.

The statute of Alabama (sec. 3910), makes it the duty of a miner to inform the mine operator of any defects or of any negligence that may or probably will result in an injury to the miner. This statute can not be held to mean that it is necessary for a miner to inform the mine operator of any such defect or negligence, where the mine operator or his mine foreman has knowledge of any such defect or negligence. As the law does not require the doing of a useless thing and it would not be necessary for the miner to notify the operator if the operator already knew of the condition and this is true, although the miner may not be aware that the operator knew of the defect.

Clinton Min. Co. v. Bradford (Alabama), 76 Southern, 74, p. 78.

VIOLATION BY MINER.

VIOLATION OF STATUTE PREVENTS RECOVERY.

Section 3983-3984, Revised Laws Oklahoma, 1910, applies to mines, and it is the duty of a mine foreman to comply with the law as prescribed by these sections, and a failure upon his part so to do constitutes such negligence as will preclude a recovery in an action by him for injuries.

Sandals v. Mizpah Min. Co. (Oklahoma), 168 Pacific, 808.

EFFECT ON RIGHT TO RECOVER.

The supreme court of Oklahoma approves the general rule that the violation of a statute by an injured person is negligence per se on his part and precludes him from recovering damages. The court strangely says that if it were not for the constitution providing that the defense of contributory negligence shall in all cases be a question of fact left to the jury, a trial court might instruct the jury that the violation of a statute by a plaintiff "was not merely evidence of contributory negligence, but a conclusive bar to his recovery." The court seems to be unable to see, or is at least unwilling to make any distinction between contributory negligence and the violation of a statute. The court does say, in effect, that the doing of a particular act prohibited by statute, or the failure to do an act commanded by statute, on the part of a mine operator, is negligence as a matter of law or negligence per se, and that this is true irrespective of the question of the exercise of prudence, diligence, care, or skill. But the court refused to apply the same rule to a miner who violated the statute.

Oklahoma Coal Co. v. Corrigan (Oklahoma), 168 Pacific, 1024, p. 1028.

FAILURE OF MINE FOREMAN TO INSPECT—RECOVERY FOR INJURY.

A mine foreman who entered the room and working place of a miner for a purpose other than inspection and without inspecting the same, can not recover damages from the mine operator for injuries caused by a fall of rock, due to the negligence of the miner in the manner of working his room and leaving the roof unpropped. The entering of the room by the mine foreman for the purpose of measuring the gobwork without first inspecting the room, constituted a violation of the statute that would prevent his recovery for the injuries complained of.

Oklahoma Coal Co. v. Corrigan (Oklahoma), 168 Pacific, 1024, p. 1025.

STATUTORY PROTECTION.**PERSONS WITHIN STATUTORY PROTECTION—PLEADING.**

A miner brought suit against a mine operator for damages for injuries due to the alleged negligence of the operator. The action was a common law action for negligence. An answer by the mine operator attempting to show that the injuries complained of resulted from the violation of a statutory duty imposed upon the miner, who at the time he received the injuries complained of was acting as a statutory mine foreman, was insufficient where it failed to show that the mine so operated and in which the injuries were received was within the statutory provision, in that it failed to allege that

there were ten or more persons employed in the mine at the time the complainant was injured. The rule is that a pleading in a statutory action must bring the case within the requirements of the statute, and any omission in this respect can not be supplied by intendment.

Sandals v. Mizpah Min. Co. (Oklahoma), 168 Pacific, 808, p. 809.

EFFECT ON CONTRIBUTORY NEGLIGENCE.

VIOLATION OF STATUTE.

The Virginia mining statutes provides that no person shall under penalty travel on foot to and from his work upon any slope, engine plane, or motor road when other good roads are provided for that purpose. A miner who enters a mine in violation of this statute is guilty of contributory negligence per se and can not recover for an injury occasioned thereby.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 373.

QUESTION OF FACT.

By the constitution of Oklahoma (sec. 6, art. 23), the defense of contributory negligence is a question of fact that shall at all times be left to the jury. The courts are never at liberty to direct a verdict in favor of a defendant on the ground that the plaintiff was guilty of contributory negligence as a matter of law. In all cases whatsoever, contributory negligence must be considered as a question of fact to be left to the jury.

Oklahoma Coal Co. v. Corrigan (Oklahoma), 168 Pacific, 1024, p. 1027.

NO DEFENSE IN CASE OF VIOLATION OF STATUTE.

Under the statute of Illinois contributory negligence of an employee in a coal mine is no defense to an action for damages for an injury received by him by reason of the operator's willful violation of the mining statute.

Randall v. Crescent Coal Co. (Illinois), 117 Northeastern, 733, p. 777.

STATUTORY AND COMMON LAW RULE.

The rule that where a mine foreman or boss is given supervision over a part of the work and is charged with the duty of inspecting the same, and he fails to make such inspection and is injured by the very objects and instrumentalities over which his power extends, obtains in jurisdiction where the general rule as to contributory negligence prevails; but it does not obtain in jurisdictions where the defense of contributory negligence has been abolished by statute.

Oklahoma Coal Co. v. Corrigan (Oklahoma), 168 Pacific, 1024, p. 1027.

MINER'S KNOWLEDGE OF DEFECTS—FAILURE TO INFORM OPERATOR.

The proviso or amendment to section 3910 (Ala. Code, p. 602), is to relieve a miner from the imputation of contributory negligence because of his remaining in the service after knowledge of the defect or negligence on the part of the mine operator, where the miner himself did not commit the negligent act causing the injury and upon whom the duty to remove the defect did not rest; but the amendment does not relieve a miner of the duty to inform the operator or his agent of such defect or negligence when he ascertained such knowledge and when the employer or his agent has no such knowledge.

Clinton Min. Co. v. Bradford (Alabama), 76 Southern, 74, p. 76.

See *Reynolds v. Woodward Iron Co.* (Alabama), 74 Southern, 360.

EFFECT ON ASSUMPTION OF RISK.**BASIS OF DOCTRINE OF ASSUMPTION OF RISK.**

The doctrine of assumption of risk by an employee of the continued negligence of the employer, because such negligence was known to the employee, is a hard one and all statutes looking to relief from it should be liberally construed against it. Penal statutes requiring safeguards for laborers rest on the care of the state for the employee for the sake of himself, of the persons dependent on him, and of the community. The primary and insistent necessity for the enactment of such laws is that men will work in mines and other dangerous places at the constant risk of death or injury whether such precautions are taken for their safety or not.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 371.

QUESTION OF FACT.

The constitution of Oklahoma provides that the defense of assumption of risk shall in all cases be a question of fact and shall at all times be left to a jury. A court can not direct a verdict in favor of a defendant on the ground that the facts conclusively show that the plaintiff assumed the risk. Assumption of risk in all cases whatsoever must be considered as a question of fact to be left to the jury.

Oklahoma Coal Co. v. Corrigan (Oklahoma), 168 Pacific, 1024, p. 1027.

OPERATOR'S VIOLATION OF STATUTE—MINER CAN NOT WAIVE.

The violation of a penal statute can not stand on the same legal footing as common law negligence, but renders the mine operator liable to an injured miner, where the injury is the proximate result of the violation of the statute, and it can not be held that a miner assumes the risk of a violation of the statute by the operator though with knowledge of such violation where it is made impossible for him to waive the operator's violation of the statute.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 371.

MINER'S KNOWLEDGE OF DEFECTS—DUTY TO NOTIFY OPERATOR.

The amendment to section 3910 (Ala. Code, p. 602), relieves a miner of the assumption of risk predicated on the fact of his remaining in the employ of the operator after knowledge of a defect or of the operator's negligence, where the miner did not himself commit the negligent act and upon whom the duty to remedy the defect did not rest. But the duty is imposed upon him to give the operator or his managing agent information of any defect or negligence.

Clinton Min. Co. v. Bradford (Alabama), 76 Southern, 74, p. 76.

FELLOW SERVANTS.**FELLOW SERVANTS—MINERS WORKING IN SAME PLACE.**

The statute of Utah defines fellow servants as persons engaged in the same grade of service and working together at the same time and place and to a common purpose. This statute must be construed in the light of what the law was on the subject when it was adopted, and when considered in that light the words used must be given their usual and ordinary meaning. It is not necessary that two workmen or miners must work side by side or come in continuous physical contact or touch with each other in order to work at the same place within the meaning of the statute. It would be straining the words of the statute beyond ordinary meaning if it were held that two miners who were working on different levels of a mine are working at the same place within the purview of the statute. Within the meaning of the statute two miners working on different levels in a mine, although working at the same time and to a common purpose, are not fellow servants.

Shields v. Silver King Coalition Mines Co. (Utah), 166 Pacific, 988.

NEGLIGENCE OF FELLOW SERVANT.

An electric motor in a mine was equipped on the front with a 16-candlepower incandescent electric light located about 2 feet above the rail. It also had an arc light located on top of the motor with a reflector that gave a large and brilliant light. The motor driver depended upon this light for lighting up the entry in front of him and it could be turned like a spot light so as to give light in any direction desired, but it gave light only in the direction in which the lens was turned, and when properly turned it would light up an entry or a runaround for a hundred feet so that the motor driver could see objects distinctly that distance in the direction in which the light was turned. The motorman while taking his motor through a run-around negligently failed to turn the arc light so that he could see in the runaround and by reason of this negligence, he ran his motor into and against some empty cars that a bottom man was conducting through the runaround and by reason of which the bottom man was

injured. The mine operator had elected not to accept the provisions of the Illinois workmen's compensation act and for such reason he could not in an action by the injured bottom man set up as a defense the negligence of a fellow servant.

Daly v. New Staunton Coal Co. (Illinois), 117 *Northeastern*, 413, p. 416.

WORKMEN'S COMPENSATION ACT.

CONSTRUCTION—RIGHT OF REVIEW—NOTICE—EXTENSION OF TIME.

The law does not require the Industrial Accident Board to give parties notice of filing an award or require that notice of it be served upon them. The right of parties to file a claim for review expires after seven days from the time of the award and if no claim of review is filed by either party the award stands as the decision of the board. The board may, in exceptional cases and for special reasons, grant an extension of time, but a general rule extending the time for reviewing a claim would be inconsistent with the statute itself. The extension of time is a matter of discretion with the Industrial Board and where the discretion is not abused the courts will not interfere and relieve a party.

Brunette v. Quincy Min. Co. (Utah), 163 *Northwestern*, 1013, p. 1014.

PURPOSE AND CONSTRUCTION.

The purpose of the Iowa workmen's compensation act is that it forms a legislative response to a public demand that a system be afforded whereby employers and employees might escape the evils of personal injury litigation and employees not guilty of willful misconduct might at once receive reasonable compensation for injuries received in their employment, and on the theory that the more hazardous industries would be made to bear the financial losses sustained by the workmen engaged therein through personal injuries. The act should be so construed as to carry out the purposes and objects of the act.

Mitchell v. Phillips Min. Co. (Iowa), 165 *Northwestern*, 108, p. 110.

CONSTRUCTION—ELECTIVE PLAN—COMPENSATORY FEATURES.

The legislature in passing the Iowa workmen's compensation act made it elective rather than compulsory. Under the act an employer was given the right to elect whether he would reject the compensatory features of the law, but if he did so he was deprived of the benefits of certain common law defenses. A radical change was also made with reference to the matter of evidence, and the injured party is not required to do more than prove the injury in the discharge of his duties to make out a prima facie case. The legislature did not intend that an employer who rejected the provisions of the act should be

given an advantage thereby over an employer who elected to accept the provisions of the act. The inference is that the legislature intended that an employer rejecting the act should pay damages, and that it should be reasonably certain that an employee could collect them and that these provisions of the act should be an inducement to influence an employer to elect to accept the provisions of the act and pay compensation in accordance with its terms.

Mitchell v. Phillips Min. Co. (Iowa), 165 Northwestern, 108, p. 110.

SCOPE OF EMPLOYMENT—RIGHT TO COMPENSATION.

A custom prevailed in a mine by which it was the duty of the men of a shift to drill blasting holes, load them with explosives, and fire the shots at the end of the shift's work. It was a part of the custom for the miners who drilled and loaded the holes and lighted the fuses to wait at a safe distance, listen, and count the explosions to determine if all the shots had exploded. It was also a part of the custom for such miners either to report the missed shots to the superintendent in order to protect the next shift or for one of the departing shift which had fired the shots, to return and investigate and remedy the dangerous situation left by the unexploded charges. But by reason of the smoke, gas, and fumes caused by such explosions the miners wait a reasonable length of time before returning to examine the exploded shots. Under such circumstances a miner who assisted in firing certain shots, after waiting a reasonable time, and who returned, made the investigation and then, some time after his regular quitting hour, left the mine and the premises, was, while so departing from the premises, within the scope of his employment and entitled to compensation for an injury received at such a time.

Atolia Min. Co. v. Industrial Accident Commission (California), 167 Pacific, 148.

EMPLOYER CAN NOT WAIVE COMPLIANCE WITH STATUTE.

A mine operator who elected to reject the provisions of the Iowa workmen's compensation act and who subsequently gave notice to the industrial commissioner of his intention to waive such election and to accept the provisions of the workmen's compensation act, but who failed to post notices of such election on his premises, can not, in a common law action by an injured miner on the ground of negligence avoid liability by showing that the posting of notices on his premises would be useless or futile for the reason that the complainant was an Austrian and could not read the English language.

Paucher v. Enterprise Coal Min. Co. (Iowa), 164 Northwestern, 1035, p. 1037.

REJECTION BY OPERATOR—NEGLIGENCE—PRESUMPTION.

The Iowa workmen's compensation act makes a radical change with reference to the matter of evidence from the common-law rule.

If a mine operator elects to reject the act and a miner in his employ is injured and sues for damages in a common-law action, he is only required by the statute to make out a prima facie case and the act itself places the burden of proof upon the operator and also expressly provides that the employer shall be presumed negligent. The legislature intended, in case the provisions of the act were rejected, that the evidence of an injury should be considered as evidence of negligence and that the fact of negligence might be proved and established by operation of this presumption.

Mitchell v. Phillips Min. Co. (Iowa), 165 Northwestern, 108, p. 110.

REJECTION AND ACCEPTANCE OF STATUTE—COMPLIANCE.

A mine operator who rejected the provisions of the workmen's compensation act and subsequently elected to accept its provisions must comply substantially with the statutory requirements under such circumstances and notice must be given to the industrial commissioner and by posting upon the premises, as required by the statute, and the mere tearing down of the former notices and his rejection of the act is not a compliance with the statute.

Paucher v. Enterprise Coal Min. Co. (Iowa), 164 Northwestern, 1035, p. 1036.

REJECTING AFTER ACCEPTING ACT—LIABILITY FOR NEGLIGENCE.

Under the Iowa workmen's compensation act when an employer or employee has elected to reject the terms of the act, such election shall continue until either shall thereafter elect to come under the provisions of the act; but either may at any time after rejecting the provisions of the act elect to accept the provisions of the statute by giving notice as required. The statute also provides that an employer shall be presumed to have elected to pay compensation according to the statute unless notice in writing of an election to the contrary shall be given in the manner provided. In an action by an injured miner against the mine operator for damages, the mine operator can not defeat a recovery on the ground of negligence by showing that he had elected to accept the terms of the workmen's compensation act, where he had properly given notice that he rejected the terms of the statute and subsequently gave notice that he had waived his rejection and had elected to accept the provisions of the statute. The mere filing of a notice by the mine operator with the industrial commissioner of his intention to accept the provisions of the act and waive his former objection and the tearing down the notices posted at the mine rejecting the act without posting notices by his subsequent acceptance of the act, is not a compliance with the statute and is not sufficient to relieve the mine operator from his common-law liability for negligence.

Paucher v. Enterprise Coal Min. Co. (Iowa), 164 Northwestern, 1035.

REJECTION AND ACCEPTANCE—LIABILITY INSURED.

A mine operator who first elected to reject the provisions of the Iowa workmen's compensation act and subsequently elected to waive his former rejection and accept the provisions of the act, must comply substantially with the statute by giving the notices required, and he must also insure his liability under the act in some corporation, association, or organization approved by the State Department of Insurance or be subjected to the liabilities of one having rejected the act.

Paucher v. Enterprise Coal Min. Co. (Iowa), 164 Northwestern, 1035, p. 1037.

ELECTION NOT TO BE BOUND BY—CONTRIBUTORY NEGLIGENCE.

A mine operator who elects not to be bound by the workmen's compensation act of Illinois is prevented by the statute from making any one of the defenses of assumed risk, contributory negligence, or that the injury was caused by the negligence of a fellow servant.

Daly v. New Staunton Coal Co. (Illinois), 117 Northeastern, 413, p. 416.

PROOF OF INJURY—PRESUMPTION OF NEGLIGENCE—BURDEN OF PROOF.

The workmen's compensation act of Iowa provides that in an action by an employee against the employer for damages for personal injuries arising out of and in the course of the employment, where an employer has elected to reject the provisions of the act, it shall be presumed that the injury complained of was the direct result and growing out of the negligence of the employer and that such negligence was the proximate cause of the injury. It also provides that the burden of proof in such cases shall rest upon the employer to rebut the presumption of negligence. Under this provision of the statute, in an action against a coal mine operator for damages for the death of a miner, it is sufficient to make a prima facie case, to prove the relation of the deceased to the operator, and that the injuries which resulted in his death were sustained by a fall of slate while in the course of his employment, and that the mine operator had elected to reject the provisions of the statute. When such proof is made, the statute creates the presumption of negligence on the part of the mine operator and that the negligence was the proximate cause of the death of the miner. It is not the office of this presumption created by the statute merely to fix the burden of proof and determine which party shall go forward first with testimony. The mine operator is required to do more than rebut the burden of proof. The effect of the presumption created by the statute is to establish negligence that must be regarded as a fact until contradictory evidence requires a different conclusion. The happening of the accident stands as substantive evidence of negligence on the part of the operator. The presumption arising from proof of the accident is to

be given the effect of affirmative evidence establishing prima facie the fact of negligence. In the absence of evidence on the part of the defendant the statutory presumption is to have the force of proof, affording warrant for the passing of judgment. If the mine operator shall proceed with proof the presumption continues having all the force of substantive evidence of negligence until overcome by the weight of affirmative evidence introduced in proof of due care.

Mitchell v. Phillips Min. Co. (Iowa), 165 Northwestern, 108, p. 109.

Mitchell v. Des Moines Coal Co. (Iowa), 165 Northwestern, 113.

NEGLIGENCE—PRESUMPTION FROM INJURY—REBUTTABLE.

The Iowa workmen's compensation act makes an injury to a miner in the course of his employment a presumption of negligence on the part of a mine operator who has elected not to accept the provisions of the act. This presumption is rebuttable, and a mine operator may show by evidence that he was not guilty of negligence or that his negligence was not the proximate cause of the injury. The strength of the presumption will depend somewhat upon the facts of each case. The evidence on behalf of a defendant in such a case may be so convincing or undisputable as to show the defendant free from negligence or that the complainant was guilty of willful misconduct or intoxication. Or the physical facts might be such as to preclude a recovery, or it might be possible in case that in proving the accident additional facts might appear which would exonerate the defendant. In any event it is a question for the jury to say whether or not a presumption has been overcome by the defendant's proof.

Mitchell v. Phillips Min. Co. (Iowa), 165 Northwestern, 108, p. 110.

See *Mitchell v. Des Moines Coal Co. (Iowa)*, 165 Northwestern, 113.

PRESUMPTION OF NEGLIGENCE—PROOF INSUFFICIENT TO OVERCOME PRESUMPTION.

In an action for the death of a miner caused by injuries received while in the line of his employment, on proof of the fact that the injuries were received in the course of the employment and that the mine operator had not elected to accept the provisions of the Iowa workmen's compensation act, the evidence given by the mine operator in defense of the action must be sufficient to overcome the statutory presumption of negligence on his part.

Mitchell v. Des Moines Coal Co. (Iowa), 165 Northwestern, 113.

Mitchell v. Phillips Min. Co. (Iowa), 165 Northwestern, 108.

PRESUMPTION AS TO DEPENDENCY.

A miner came to this country from Hungary, leaving a wife and one child. He returned to his home once, but contributed substantially to the support of his wife and child and expected to bring them to this country when he had earned sufficient money to pay the

expenses. Under such facts upon his death after seven years from the time he left home the wife is not under the workmen's compensation act of Michigan entitled to the benefit of the conclusive presumption of dependency upon the theory that she lived with her husband at the time of his death.

Kalcic v. Newport Min. Co. (Michigan), 163 Northwestern, 962, p. 963.

WIDOW'S DEPENDENCY—PROOF.

A miner who came to this country from Austria-Hungary and remained here for seven years before his death left a wife and one child in Croatia, but contributed to their support during all the time of his absence and in the last year of his life sent to his wife about \$80. The fact that she by her labor made some trifling earnings, amounting to about 20 cents a day two or three times a month, can not be held sufficient to change her status, and a finding that the widow was totally dependent upon the husband at the time of his death was justified.

Kalcic v. Newport Min. Co. (Michigan), 163 Northwestern, 962, p. 963.

MINER SHOT BY GUARD—RIGHT TO COMPENSATION.

It was the duty of miners working in a mine to drill blasting holes, load them with explosives, and fire the shots at the end of the work of the night shift. It was a part of the duty of the miners to wait and count the shots to see if all exploded, and if not, for one of them to return, after waiting a reasonable time for the smoke, gas, and fumes from the explosion to pass away, and examine as to the unexploded shots. A night shift on quitting the mine at 2 o'clock in the morning loaded and fired the shots and discovered that there were two unexploded shots. One of the miners living near the mine, after waiting a reasonable time, returned in accordance with the duties of the miners to the working place and investigated as to the unexploded shots and thereafter left the mine. The mine operator employed and kept guards around the mine to prevent "high grading" or theft of ores, and while the miner was leaving the mine and walking to his tent he was, without warning and while carrying his light, shot from the rear by one of the guards employed by the mine operator. Under such circumstances it will not be presumed that the guard deliberately perpetrated an assault to commit murder, but it must be assumed that the guard who fired the shot believed that the circumstances justified him in doing so and that he was acting within the line of his employment and that the miner who was shot was injured by the negligent performance of an act within the general scope of the duties of the guard inflicting the injury, and under such circumstances the miner is entitled to compensation under the workmen's compensation act of California.

Atolia Min. Co. v. Industrial Accident Commission (California), 167 Pacific, 148.

EMPLOYER'S LIABILITY ACT.**CONSTRUCTION OF STATUTE—APPLICATION TO CONTRACT.**

The provisions of paragraph 3, section 3, of the employer's liability law (Louisiana Act No. 20, 1914), only applies to contracts of employment that have been in existence more than 30 days. It is inconceivable that a contract of employment made less than 30 days before an accident could contain a notice which would precede the accident by not less than 30 days, as required by the statute. A contract of employment not having been in existence 30 days must be gauged by paragraph 1 and is excluded from the operation of the statute. Such an employee injured while in the employment of an oil company must be remitted in his right to recover damages to article 2315 of the Civil Code.

Woodruff v. Producers' Oil Co., 142 Louisiana, 76 Southern, 803, p. 805.

CONSTITUTIONALITY—RIGHT TO QUESTION.

An employee of an oil company suing for compensation under the employer's liability law (Louisiana Act No. 20, 1914), has no interest while suing under its provisions in attacking its constitutionality.

Woodruff v. Producers' Oil Co., 142 Louisiana, 76 Southern, 803, p. 804.

Wall v. Parrot Silver & Copper Co., 244 U. S., 407, p. 409.

APPLICATION TO MINES.

The employer's liability act of Indiana (Laws, 1911, chap. 74), applies to coal mines and an action may be maintained under that act for injuries arising in coal mines.

Peacock Coal Min. Co. v. Crawford (Indiana Appeals), 117 Northeastern, 504.

Vivian Collieries Co. v. Cahall, 184 Indiana, 473; 110 Northeastern, 672.

Vandalia Coal Co. v. Shephard, (Indiana), 113 Northeastern, 767.

PROXIMATE CAUSE OF INJURY—PLEADING.

A complaint in an action by a miner for damages for injuries received while working in a mine is sufficient under the first subdivision of the employer's liability act (Ala. Code, sec. 3910), where it avers that complainant's injuries were sustained proximately by reason of a defect in the ways, works, machinery, or plant connected with or used in the business of the mine operator and which defect consisted in that the roof of the mine in which plaintiff was working was defective and such defective roof was known to the defendant operator and to the person in charge of the ways, works, machinery and plant and that the operator and the person so in charge knew that if the roof remained in such defective condition, the complainant would likely or probably be killed or seriously

injured in body, but notwithstanding such knowledge the operator and the person so in charge grossly, wantonly, and recklessly permitted the roof to remain in such defective condition and the complainant was proximately injured from such gross and wanton negligence.

Clinton Min. Co. v. Bradford (Alabama), 76 Southern, 74, p. 76.

See *Clinton Min. Co. v. Bradford*, 192 Alabama, 576; 69, Southern, 4.

STATUTORY ACTION FOR WRONGFUL DEATH.

RIGHT OF WIDOW TO SUE.

The statute of Kentucky authorizes an administrator to maintain an action for the wrongful death of a miner. But where the administrator refuses to bring suit the widow of the deceased miner may maintain the action.

Harris v. Rex Coal Co. (Kentucky), 197 Southwestern, 1075.

ARTESIAN WELLS.

CONSTRUCTION, VALIDITY, AND EFFECT OF STATUTE.

The purpose of the statute of New Mexico (secs. 265-268, Code 1915), authorizing the artesian well supervisor to enter upon the land of a private person and stop the flow or waste of artesian water is a valid exercise of the police power of the State. The making of the repairs on the well as provided by the statute or the preventing of waste is not for the benefit of the owner of the land upon which the well is located which may be wasting water, but is for the purpose of abating a public nuisance. The statute authorizes the well supervisor to make the repairs or to plug the well in case the owner fails to do so after notice. The legislature evidently was of the opinion that this provision was necessary in order to conserve the artesian waters of the State for the purpose of irrigation and other beneficial uses; and it is competent for the legislature to conserve the natural resources of the State. The artesian waters in a given district come from the same source and are obtained by sinking wells to the common basis, thereby enabling the water to find its way to the surface. Naturally the waste of water derived from the common source or supply diminishes the amount of water available for legitimate uses, and therefore works an injury and a detriment to the general public desiring to make use of such waters.

Eccles v. Ditto (New Mexico), 167 Pacific, 726, p. 728.

WELL SUPERVISOR—DUTY TO STOP FLOW.

Section 265 of the Statute of New Mexico (Code, 1915), authorizes the artesian well supervisor where the water of an artesian well is suffered or permitted by the owner unnecessarily to flow or to go

to waste, to notify in writing such owner to make diligent efforts to have such flow of water stopped within 30 days. On the failure of such owner to take such steps it is made the duty of the artesian-well supervisor to cause the necessary repairs to be made or take whatever steps necessary to stop the flow of waste water by plugging the well. The statute does not contemplate that the well supervisor shall undertake at great expense to repair a well so as to continue the flow for the use of the owner when the waste might be limited at a small expense by plugging the well. The supervisor is the representative of the public or the water consumers of the district and the public has no concern with the question as to whether or not the owner of the land shall continue to use water from the well. If he fails on proper notice to repair the well, the public interest demands only the abatement of the nuisance by stopping the waste of water, and if this can be done by plugging the well at a trifling expense, whereas to repair the well would entail a large expense, it is the duty of the well supervisor to adopt the least expensive and the most efficacious method, as the public is interested only in preventing the waste of water. But the method and means to be adopted to abate the nuisance is placed by the statute in the discretion of the well supervisor, and in the absence of a showing of gross abuse of such discretion the courts will not interfere.

Eccles v. Ditto (New Mexico), 167 Pacific, 726, p. 730.

FLOWING ARTESIAN WELLS—NUISANCE.

The statute of New Mexico (sec. 265–268, Code, 1915), provides for the summary abatement of a public nuisance created by an artesian well that has been permitted by the owner to be and remain out of repair so that water is unnecessarily permitted to flow to waste and authorizing the artesian well supervisor, created by statute, to enter upon the premises and repair or plug the well, is a valid exercise of the police powers of the State and is not violative of either the constitution of the State or of the United States.

Eccles v. Ditto (New Mexico), 167 Pacific, 726, p. 727.

ABATEMENT OF NUISANCE—ENTRY ON LAND.

The artesian well supervisor is by section 265 (Code New Mexico, 1915), authorized to enter upon the lands and premises of the owner of an artesian well who fails on notice to stop the flow and waste of water from such well, and himself repair or plug the well. Under such authority the officer is authorized to enter upon the lands of the guilty party, provided he can do so in a peaceable manner and remove or abate the nuisance, doing no greater injury than is necessary to accomplish the abatement of the nuisance.

Eccles v. Ditto (New Mexico), 167 Pacific, 726, p. 726.

MINES AND MINING OPERATIONS.

RELATION OF MASTER AND SERVANT.

WHAT CONSTITUTES STATUS.

One who represents and carries out the will of the master or of a mine operator in the prosecution of the work not only as to the result to be accomplished but also as to the means to be employed, is a servant and not an independent contractor.

Clinton Min. Co. v. Bradford (Alabama), 76 Southern, 74, p. 79.

PROOF OF RELATION OR STATUS.

There is no error in permitting an injured employee to testify that he worked for the mine operator, especially where this is merely introductory to the evidence that was to follow and where there was no attempt to impeach or to corroborate or to contradict his testimony.

Empire Coal Co. v. Goodhue (Alabama), 76 Southern, 31, p. 32.

EXISTENCE OF RELATION—TERMINATION OF RELATION.

The relation of master and servant existing between a coal mine operator and his miners continues to exist until the miners who are hauled out of the mine on an electric car are taken to the surface of the mine, depart from the car, and are no longer under the control of the operator or amenable to his rules and regulations.

Whalen v. Union Pacific Coal Co. (Utah), 168 Pacific, 99, p. 101.

EXISTENCE OF RELATION—PROOF OF NEGLIGENCE.

Where the relation of master and servant is an issue in any case it may be proved by the circumstances of the employment, and it is sufficient where the employee testifies that he was employed by agents of the employer and that one of such agents refused, after his injury, to pay him his wages unless he would sign a receipt.

Wolverine Oil Co. v. Kingsbury (Oklahoma), 168 Pacific, 1021.

ACTIONS—PLEADING AND PROOF OF NEGLIGENCE.

PLEADING NEGLIGENCE—SUFFICIENCY OF COMPLAINT.

A complaint in an action by a miner for damages for injuries averred that a coal mine operator, the defendant, negligently failed and omitted to keep the working place in the mine where the com-

plainant was assigned to work and the roof thereof in a reasonably safe condition, and carelessly and negligently permitted the roof to become weak, unsafe, and dangerous continuously for three days; that with knowledge of such weak, unsafe, and dangerous condition of the roof the operator negligently failed and omitted to take down and remove therefrom certain loose slate and rock which during such time was in the roof, and negligently failed and omitted otherwise to make the roof reasonably safe and secure; that with knowledge of such dangerous conditions the operator negligently and carelessly directed the complainant to enter said room for the purpose of mining coal therein; that the complainant did not at any time prior to his injury have any notice or knowledge of such weak, unsafe, or dangerous condition of the roof, but in obedience to such orders, and believing the room and roof thereof to be safe, entered the same and began mining coal under his employment; that while so engaged and within a few minutes after entering the room the roof suddenly and without warning gave way and large quantities of loose rock and slate fell upon and injured the complainant. It is also averred that during all the time the operator employed in said mine more than five persons, to wit, 25 persons. These averments clearly show that the pleading is based on a violation of the common-law duty of the mine operator to keep the miner's working place reasonably safe, and is sufficient upon that theory.

Peacock Coal Min. Co. v. Crawford (Indiana Appeals), 117 Northeastern, 504.

In an action for damages for the death of a miner the complaint or declaration is sufficient which alleges that the death proximately resulted from the negligence of an employee who was also in the employ of the defendant mine operator, who had superintendence intrusted to him by the operator, while in the exercise of such superintendence, and that the negligence of said superintendent consisted in this: That the said employee who had superintendence of a certain steam shovel used in mining ore and the man who worked on or about the same negligently allowed said steam shovel to be operated in a manner dangerous to the safety of the intestate, whereby the dipper attached to such steam shovel fell upon and killed the miner.

Sloss-Sheffield Steel & Iron Co. v. Harrison (Alabama), 76 Southern, 47.

PERSONAL INJURIES—SUFFICIENCY OF COMPLAINT.

A miner suing for damages for injuries alleged in substance: (1) Defendant's corporate capacity; (2) its ownership of the mine; (3) the employment of the plaintiff; (4) his place of work; (5) the location of a shaft in which the cage was operated; (6) its relation to the plaintiff's place of work; (7) the purpose of the cage; (8) the manner of its operation by the engineer; (9) the employment of the

engineer; (10) his duties in respect to the cage and the persons being carried therein; (11) the carelessness of the mine operator in failing to employ a competent engineer; and finally the carelessness and negligence of both the engineer and the company in operating the cage while attempting to convey plaintiff to his place of work, together with the consequential injury to him and the damages sustained by him. A plaintiff may be charged with as many acts or omissions constituting negligence as the circumstances warrant and he may rely upon one or all according to the effect, without being subject to the charge of switching from one theory to another. While the complaint may not be perfect in form as against hypercritical objectors, not a single element of a good complaint is omitted.

Farnon v. Silver King Coalition Mines Co. (Utah), 167 Pacific, 677.

PLEADING AND PROOF.

In an action by a miner for damages for injuries caused by falling slate he averred in his petition that the mine operator in violation of his duty failed to prop or to maintain the roof of the entries in the mine so as to make them reasonably safe for the use of the employees passing into and out of the mine; and that the mine operator negligently ordered and directed the injured miner to perform his work in the place where the accident occurred. Under such allegations of negligence, it is not proper to make proof of negligence on the part of the mine operator in failing to furnish the miner props for his use in propping the roof of the mine. Under the allegation of the failure of a mine operator itself to prop the roof where the injured miner was working and of the operator's failure to furnish the miner a reasonably safe place to work, evidence of the operator's failure to furnish the miner sufficient props to support the roof is not admissible. In such a case the proof of negligence must follow strictly the allegations of the pleading and it is not permissible to make proof of acts of negligence outside of the issues framed by the pleading.

Stearns Coal & Lumber Co. v. Gaines (Kentucky), 197 Southwestern, 927, p. 928.

PLEADING AND PROOF—PROXIMATE CAUSE.

In an action for the death of a miner the complaint alleged that the deceased was injured in a mine by the explosion of gas; that he lived for a period of 11 days thereafter, and then died from the effects of the injury received in the explosion. To justify a recovery the jury must find from the preponderance of the evidence that the death of the deceased was the direct or proximate result and that the injuries alleged to have been received in the explosion were caused by the negligence of the mine operator as alleged in the complaint.

Sterling Anthracite Coal Co. v. Strobe (Arkansas), 197 Southwestern, 858, p. 859.

PROOF OF NEGLIGENCE—QUESTION OF FACT.

In an action by a miner for damages for injuries on the ground of negligence, the question of whether a wheel 16 feet in diameter and weighing about 9,000 pounds could be safely lifted by three jacks that were being used by a crowbar, a piece of pipe, and a wooded forge for handles, instead of the proper handles, and whether such jacks were sufficient to perform the work and were properly equipped and reasonably safe for the work, are questions of fact to be determined by the jury trying the case.

Wolverine Oil Co. v. Kingsbury (Oklahoma), 168 Pacific, 1021.

PRESUMPTION OF NEGLIGENCE.

The universal rule is that negligence must be proved and that it may not be inferred from the mere fact of an accident. But the law recognizes certain legal presumptions from particular facts in certain classes of cases which are entitled to consideration. Where the machinery and appliances, the giving away of which admittedly caused an injury, are under the exclusive control of the employer, a mine operator, and over which the injured employee has no control and nothing whatever to do with the construction or repair thereof, then the doctrine of *res ipsa loquitar* applies and a legal presumption of negligence arises that must be met and overcome by proof of want of negligence.

Velotta v. Yampa Valley Coal Co. (Colorado), 167 Pacific, 971, p. 973.

NEGLECTANCE PRESUMED—PRIMA FACIE EVIDENCE.

Negligence may be presumed where an injury was caused by an act which in the ordinary course of things would not have resulted in injury if due care had been used in its performance. Where an employer owes to an employee a duty to use care and the thing causing an accident is shown to be under the management of the employer or his servants and the accident is such that in the ordinary course of things does not occur if those who have the management or control used proper care, the happening of the accident in the absence of evidence to the contrary is evidence that it arose from the lack of requisite care. But under such circumstances the happening of the accident is merely prima facie evidence and not conclusive proof of negligence. If the physical facts of an accident themselves create a reasonable probability that it resulted from negligence, the physical facts are themselves evidential and furnish what the law terms "evidence of negligence" in conformity with the maxim *res ipsa loquitar*.

Velotta v. Yampa Valley Coal Co. (Colorado), 167 Pacific, 971, p. 974.

PROOF OF NEGLIGENCE—PRIMA-FACIE CASE.

The doctrine of *res ipso loquitur* applies in cases of master and servant in a more restricted sense than in the case of carrier and passenger. The mere breaking of a piece of machinery or of a dangerous live electric wire is not sufficient evidence of negligence to make it a prima-facie case against a mine operator. But where an accident and resulting injuries are caused from defective conditions which can be explained on no reasonable hypotheses other than negligence, even slight circumstances, independent of the accident itself, which tend to show negligence on the part of the master will be sufficient to authorize the submission of a case to the jury.

West Kentucky Coal Co. v. Key (Kentucky), 198 Southwestern, 724, p. 726.

BURDEN OF PROOF ON EMPLOYER—PRESUMPTION OF NEGLIGENCE.

When the thing or machinery or appliance causing an injury is under the management of the employer, and the accident is such as ordinarily does not happen if those having the management used proper care, a presumption of negligence arises from the happening of the accident. The reason for the rule is that all information as to the construction and working of the machinery and of the particular equipment in fault is in possession of the employer, as are all means of rebutting the charge of such negligence entirely within his power. An outsider can hardly be expected to prove that in the construction of the machinery or in the use of it at the time an injury occurred the employer was guilty of negligence. The injured person can only prove that the injury occurred through the operation of the employer's machinery, and having done this it is but proper to call on the employer to show that he was not negligent, that he employed careful and competent servants, and that he used improved appliances, or that there was no negligence in operation.

Velotta v. Yampa Valley Coal Co. (Colorado), 167 Pacific, 971, p. 974.

PROOF—EXPERIMENTS ON INJURED PERSON.

An electrician was employed by a coal mine operator whose duties were to look after, repair, and keep properly equipped the electric wires used in and about the coal operator's mines for illuminating purposes and for furnishing motor power to the machinery. The electrician while in the line of his duty and upon one of the poles carrying both illuminant and power wires came in contact with wires conducting the power for motor purposes and sustained a shock and slight burns. In an action for damages on the grounds of negligence the court properly refused to permit an expert electrician while giving his testimony to make an experiment upon the body of

the complainant and show that the volume of electricity which the evidence showed was passing through the wires with which the complainant came in contact at the time of the accident could be withstood by the complainant without any injurious result. Parties litigant may be subjected to physical examinations and within reasonable bounds tests may be made for the purpose of demonstrating the truth or falsity of an issue made in a particular case, but in the particular case it was the very contention of the complainant that the injuries did result, and a recovery for which he sued; and the trial court could not compel the complainant to submit to the test to determine whether the same injuries would or would not again result.

Stearns Coal & Lumber Co. v. Williams (Kentucky), 198 Southwestern, 54, p. 56.

PROOF INSUFFICIENT TO ESTABLISH.

A car of loaded coal was derailed on an incline in the mine but was held in position by a cable or chain attached to the car by a hook. Another car loaded with coal was standing at the safety catch at the bottom of the incline and a few feet below the place where the first car was derailed. Some miners and a boss carpenter, a part of whose duty it was to inspect and keep in repair the particular place, attempted to replace the derailed car upon the tracks and while so engaged the hook on the cable or chain in some unknown way became detached and the car ran back down the incline, caught the carpenter between it and the loaded car standing at the safety catch, causing injuries from which he died. In an action for damages for the death of the carpenter the proof of the facts and circumstances were not sufficient to show that the mine operator was guilty of any actionable negligence, and that the particular accident occurring in the peculiar manner in which it did could not have been reasonably expected and provided against.

McMennimen v. Lehigh Valley Coal Co. (Pennsylvania), 101 Atlantic, 735, p. 736.

NEGLIGENCE OF OPERATOR.

PROXIMATE CAUSE—QUESTION OF FACT.

Where negligence on the part of a mine operator is shown, whether the intervening negligence of the person injured is a proximate cause of the injury is a mixed question of law and fact, and is therefore primarily one for a jury to determine upon proper instructions. A court can not undertake to settle it in any case where it involves the weighing of conflicting evidence, the balancing of probabilities, and the drawing of inferences.

Oklahoma Coal Co. v. Corrigan (Oklahoma), 168 Pacific, 1024.

PROXIMATE CAUSE OF INJURY.

The failure of a coal mining company to use ordinary care to keep the roof of an entry safe can not be said to be the proximate cause of the death of a miner who left his working place and went to the working place of another miner to obtain some information and while in the working place of the other miner was killed by a fall of rock from the roof.

Hyden v. Stearns Lumber & Coal Co. (Kentucky), 198 Southwestern, 775.

PROXIMATE CAUSE OF INJURY—INTERVENING AGENCY.

A miner was directed by the mine foreman to repair the track at a particular point where the rails had spread, thereby causing the mine cars to become derailed. While so engaged a miner pushed a loaded car down the track and the car was derailed. The track repairer while assisting to place the loaded car back on the tracks was injured by a trip of empty cars that was pushed into the entry where the work was being done. The entry was not lighted and there was no light upon the front of the trip of empty cars and the lights on the miners' caps were insufficient to permit them to see the trip of empty cars. The miner had just been assigned to the duty of repairing the track and had been given no warning as to the empty cars being pushed in. The loaded car under such circumstances can not be regarded as an intervening agency or the superseding cause of the miner's injury. A superseding cause must entirely supersede the operation of the negligence of the mine operator so that such cause alone without the operator's negligence contributing in the slightest degree thereto did in fact produce the injury.

Clinchfield Coal Corp. v. Ray (Virginia), 93 Southeastern, 601, p. 604.

CONCURRING CAUSES—LIABILITY.

Where two concurring causes produce an injury that would not have resulted in the absence of either, the party responsible for either cause is liable for the resulting injury.

Sterling Anthracite Coal Co. v. Strobe (Arkansas), 197 Southwestern, 858, p. 859.

NEGLIGENCE NOT PRESUMED FROM INJURY.

In an action for the death of a miner caused by an explosion of gas, the jury can not presume or infer negligence alone from the condition of the mine or the accident itself, or both. Proof that the working place of the miner was filled with gas and an explosion followed causing the death of a miner would not justify a recovery without proof that the condition was caused by the negligence of the mine operator.

Sterling Anthracite Coal Co. v. Strobe (Arkansas), 197 Southwestern, 858, p. 859.

NO DUTY OWING.

A mine operator can not be charged with negligence where the miner was injured while taking down slate and where he himself was charged with the duty of taking down the slate for his own protection and where the perils to which he was subjected were of his own creation, as in such case, the mine operator owes the miner no duty to use ordinary care to furnish him a reasonably safe place for work.

Gregg v. Stonega Coke & Coal Co. (Kentucky), 198 Southwestern, 5.

PERSONAL INJURIES—DISEASE SUPERVENING—LIABILITY.

A miner was severely and dangerously burned by an explosion of gas in his working place, although the mine inspector had reported the miner's working place as free from gas. The miner was burned on both arms, across the chest and neck, and all of his face and back of the neck and on his back lower than the shoulder blades, and all the skin on both arms came off. By reason of these injuries the miner, a young man of 31 years of age and otherwise an exceedingly stout and healthy man, was compelled to lie on his back and could not turn over, and on the day of his death, he developed hypostatic pneumonia. This was a secondary condition which might develop after any serious injury that necessitates the patient staying in bed. The evidence of a medical expert showed that if a person is burned over the chest he is more likely to have pneumonia and that the burns and the necessary recumbent position caused the pneumonia. It was sufficient to create a liability on the part of the mine operator on the ground of negligence in the matter of inspection where it appeared that the miner died from pneumonia and the pneumonia was wholly or in part caused or superinduced by the burns, as the death was in law caused by the burns on the theory that where two concurring causes produce a death, that would not have resulted in the absence of either, the party responsible for either cause is liable for the resulting injury.

Sterling Anthracite Coal Co. v. Strobe (Arkansas), 197 Southwestern, 858. p. 859.

FAILURE TO INSPECT—NEGLIGENCE OF FIRE BOSS.

The fire boss of a mine operator inspected the mine and the working places for gas in the morning before the miners began work. After finishing his inspection, he returned to the entry of the mine and marked the working places "O K," which meant that they were free from gas and safe for the miners to commence work. It was the duty of the fire boss to make the inspection and if the working places contained no gas to so mark them on the board. A miner seeing the board so marked proceeded into the mine and when near the face of his working place lit his lamp and placed it on his cap and thereupon

there was an explosion of gas by which the miner was severely injured and died 11 days thereafter. The negligence of the fire boss in failing to make a proper inspection and to discover the presence of gas was the negligence of the operator and rendered him liable for the death of the miner.

Sterling Anthracite Coal Co. v. Strobe (Arkansas), 197 Southwestern, 858.

LIABILITY FOR DEATH OF BOY.

A boy 15 years old was employed by a coal mine operator to attend a switch and when necessary to oil the sheave wheels over which a cable ran and to keep the tracks clear of coal. When not actually engaged in these duties he was required to remain on the concave side of the tracks over which cars were taken in and out of the mine. The cars were drawn up and down an incline by a cable that was held in place while passing around the curve in the track by sheave wheels or grooved pulleys attached to the track or cross ties at stated distances and over and around which the cable ran, to keep it parallel and to curve with the track. When the boy was last seen before injured he was standing at his proper position on the convex side and at the center of the arc made by the curve in the track; when next seen or found he was injured, both legs broken and with a severe scalp wound, and unconscious and died shortly after. At the time the boy was discovered in the injured condition the cable was free from the sheave wheels, some of them broken and one at least torn loose from the track and hurled a great distance and the cable was released from its curved position and was drawn straight across and some distance from the track at the boy's position, forming in effect a chord of the arc described by the track. At the trial of the case for damages for the death of the boy no witness could testify as to the actual occurrence but it was sufficient to make a *prima facie* case and to raise the presumption of negligence to prove that the track and cable and sheave wheels and all the appliances were prepared and maintained by and were under the control of the mine operator and that the boy had no control or management of or authority over any of the appliances or the method of their operation and to establish the conditions as they existed at the time the body of the injured boy was discovered.

Velotta v. Yampa Valley Coal Co. (Colorado), 167 Pacific, 971, p. 972.

FAILURE TO FURNISH PROPS—PROXIMATE CAUSE OF INJURY—QUESTION OF FACT.

The question of whether or not the negligence of a mine operator in failing to furnish props upon request by a miner was the proximate cause of the miner's death is one of fact to be determined by the jury.

Thacker v. Shelby Coal Min. Co. (Kentucky), 197 Southwestern, 633, p. 634.

FAILURE TO PROVIDE SAFETY HOLE.

The failure of a mine operator to provide a safety hole in an entry in which a miner may enter to give signals may constitute actionable negligence where a miner was killed by a runaway car while attempting to ring a bell used to signal the engineer in charge of the cars, and where such signal bell was in the entry located near the tracks.

Ford v. Lehigh & Wilkes-Barre Coal Co. (Pennsylvania), 101 Atlantic, 958.

OPERATIONS OF CAGE BY ENGINEER—NEGLIGENCE—QUESTION OF LAW.

The duty of a hoisting engineer employed by a mine operator was to operate a cage for the purpose of carrying men and material to and from the lower workings of the mine. He could keep control of the cage by properly using the brake and clutch, but by inattention to these simple details disaster might result. His mind was not engrossed by attention to other duties and his position was one of grave responsibility, although the duties pertaining to it were so simple and free from complications as to render it almost impossible to fail in the proper performance of them except through the want of such care as would constitute negligence. And where a miner entered the cage to be lowered into the mine and the signal to lower was given the engineer in the usual manner, the engineer released the brake or failed to set the clutch and the cage dropped to a depth of 110 feet with such force as to smash the bulkhead and injure the miner. Such conduct is negligence per se.

Farnon v. Silver King Coalition Mines Co. (Utah), 167 Pacific, 677.

PROXIMATE CAUSE OF DEATH OF MINER.

An explosion of gas occurred in a mine when all the employees except two shot firers were on their way out of the mine. After the miners were out of the mine, the assistant mine manager together with one other miner went back into the mine to investigate the cause of the explosion. While these two men were in the mine, a stockholder of the mining company learned that the assistant mine manager and one miner had gone into the mine and he thereupon sent a third miner, who took with him a companion, into the mine to find and bring back the assistant mine manager and the miner who had gone with him. The stockholder later having learned that the assistant mine manager and the other miner had come out of the mine by a different shaft thereupon called by telephone the miner who had gone in search of the assistant mine manager and the other miner, informed him that the two men were out of the mine and positively ordered him to come out and told him he could do no good in the mine. The miner answered: "All right." The miner said to his com-

panion that he was going on anyway and see if he could not save the two shot firers. He knew that the air was bad and his companion did all he could by way of persuasion to induce him to return out of the mine; he positively refused to do so saying that he understood the mine and that when he rested and got his wind he could go on. The miner was finally overcome and fell and his companion attempted to drag him along but was too weak himself. This companion was later overcome and was found unconscious by the rescue party and his life saved. The miner sent in by the stockholder was found dead. Under such circumstances it can not be said that the violation of the statute on the part of the mine operator was the proximate cause of the death of this miner; but the proximate cause of his death was his willful violation of the positive order of the stockholder to return out of the mine. This direction and command was given him at a time when he was in a safe part of the mine and when by obeying the order his life would have been saved.

Randall v. Crescent Coal Co. (Illinois), 117 Northeastern, 773, p. 775.

DUTY OF OPERATOR TO FURNISH SAFE PLACE.

DEGREE OF CARE REQUIRED.

A mine owner and operator is not an insurer of the safety of a miner, but the operator owes him the duty of exercising ordinary care to provide him a safe place in which to perform his duties, and this includes the entry ways in the mine to the miner's place of work and the use of care to keep such entryways free from dangerous accumulations of gas. This duty to use ordinary care to provide the miner a safe working place includes the duty of reasonable inspection of the mine, its entries, rooms, and working places and of using such means as ordinary prudence dictates as proper to safeguard the lives and limbs of its employees. The failure to exercise such care and to perform such duty constitutes negligence on the part of the mine operator.

Sterling Anthracite Coal Co. v. Strobe (Arkansas), 197 Southwestern, 858, p. 859.

EXERCISE OF CARE.

A mine operator is not required to use more than ordinary care and diligence to provide his miners reasonably safe ways of ingress and egress to and from their work.

Whalen v. Union Pacific Coal Co. (Utah), 168 Pacific, 99, p. 102.

DUTY NONASSIGNABLE—LIABILITY OF OPERATOR.

It is the duty of a mine operator to exercise reasonable care to furnish his miners a safe working place and this duty is nonassignable. In principle it is not from the difference in the character of

the service that such nonassignable duty arises, but from the situation and surrounding circumstances in which the miner is placed and the knowledge, actual or constructive, of these factors in the case being brought home to the employer.

Clinchfield Coal Corp. v. Ray (Virginia, 93 Southeastern, 601, p. 604.

MINER'S RELIANCE ON EMPLOYER'S PERFORMANCE OF DUTY.

It is the duty of a coal-mine operator to furnish a safe place for a machine operator and his helper in which to operate a coal-cutting machine. Neither the operator of the machine nor his helper is required to discover hidden dangers, but each has a right to rely upon the operator discharging his duty to him. The law in such case imposes upon the machine helper no duty of inspection, the limitation being that a miner can not brave obvious dangers and then hold the operator responsible. Under this rule, a mine operator is liable for injuries to a machine operator's helper where such injuries were caused by a fall of slate from the roof of that part of a room where the machine operator and his helper were not required to inspect or keep safe.

Consolidation Coal Co. v. Bailey (Kentucky), 198 Southwestern, 561, p. 562.

DUTY OWING TO SUBCONTRACTOR.

A mine operator entered into a contract with a third person to mine a stated amount of coal at a stated price per ton and by the terms of the contract the contractor was to prop the roof and take down the draw slate. Under this contract, the mine operator did not owe a miner employed by the contractor the duty to prop and take down draw slate. By contract the contractor, the employer of the miner, had agreed and assumed the duty to prop and take down draw slate, and the mine operator can not be held liable for failing to furnish the miner a safe place in which to work.

Lyttle v. Rex Coal Co. (Kentucky), 197 Southwestern, 1070, p. 1071.

PROOF OF CONDITIONS IN OTHER PARTS OF MINE.

In an action for the death of a miner caused by the alleged negligence of the mine operator in failing to provide the miner with a safe place in which to work and where the evidence showed that the negligence consisted in the operator using bad timbers, it is not proper to admit evidence as to the condition of the mine at other places and of the timbers at other places in the mine. But any such error is cured by an instruction by the court that the condition of the mine at any other place than that of the accident was wholly immaterial and irrelevant.

Empire Coal Co. v. Goodhue (Alabama), 76 Southern, 31, p. 32.

DUTY TO PROP ROOF—PROOF OF CUSTOM.

As a miner progresses in the work of mining and advances his room, the question may arise as to what part of the room is a miner's working place and as to when his duty to timber ceases and when the operator's duty to timber begins. In an action for the death of a miner caused by a fall of slate where the roof of the room had become dangerous and was known by the foreman of the mine to be dangerous, where there is any doubt or question as to the miner's working place, and where neither the law nor the contract fixes his working place, it is proper to prove a custom in the mine to the effect that it was a custom of the mine operator under such circumstances to place cross timbers over the place where the slate fell or to take down the defective roof, and especially where, as in this instance, there was a slip in the roof. Proof of custom was competent to show that it was the duty of the mine operator under the circumstances shown to look after the roof at the particular place in controversy.

Mitchell v. Phillips Min. Co. (Iowa), 165 Northwestern, 108, p. 110.

SIGNAL BELL IN ENTRY.

A mine operator maintained in an entry and near the mine tracks a signal bell so that miners could signal the engineer in charge of the cars. A miner while attempting to give a signal to the engineer was struck by a loaded car that became detached and ran down the slope jumping the track near where the miner was standing, causing injuries from which he died. The mine operator was negligent in not providing a safety hole for the signal where miners might stand while giving a signal.

Ford v. Lehig & Wilkes-Barre Coal Co. (Pennsylvania), 101 Atlantic, 958.

DUTY TO PROVIDE SAFE APPLIANCES.**USE OF BEST POSSIBLE APPLIANCES NOT REQUIRED.**

An employer as a mine operator is not required to use the best possible appliances in his mining operations, but in an action for damages for injuries caused by defective appliances he may show that the appliances adopted and used by him are such as are employed by many prudent persons engaged in the same business under like circumstances; but such proof, however, does not necessarily exempt an operator from liability. A prudent person may do imprudent things and fail to use proper appliances in the conduct of this business and for such neglect and failure in a proper case, he would be liable to those to whom the duty of prudence and care is due for injuries proximately resulting from such neglect and failure.

Sloss-Sheffield Steel & Iron Co. v. Harrison (Alabama), 76 Southern, 47, p. 48.

USE OF ORDINARY CARE.

The employer's duty to his employees is performed by using ordinary care for their safety in the matter of furnishing appliances, and ordinary care when applied to the duty of an employer is that degree of care which ordinarily prudent and careful persons would exercise under the same or similar circumstances. The greater the danger the greater the degree of care required to constitute ordinary care.

Whalen v. Union Pacific Coal Co. (Utah), 168 Pacific, 99, p. 104.

EMPLOYEES KNOWLEDGE OF DEFECT—RECOVERY FOR INJURY.

A miner was furnished a coal-cutting machine that was defective and out of repair. He knew as well or better than anyone else the condition of the machine he was required to operate, knew that it was out of repair and that when being operated the whole machine would quiver, shake, and jump to such an extent that the rear jack had frequently fallen, and was injured because of the shaking and jumping of the machine. Under such circumstances he can not recover damages for injuries received.

Stonega Coke & Coal Co. v. Bush (Kentucky), 197 Southwestern, 389, p. 390.

ELECTRICAL APPLIANCES.

DUTY TO USE REASONABLE CARE.

It is the duty of a mine operator to use reasonable care to maintain electric wires used in a haulageway in a safe position.

Virginia Iron, Coal & Coke Co. v. Prophet (Virginia), 93 Southeastern, 590, p. 591.

DUTY AND LIABILITY OF MINE OPERATOR.

In an action for damages for the death of a miner caused by a sagging electric wire it appeared that the attention of the mine boss in charge of the entry had been specifically directed to the sagging and dangerous condition of an electric live wire four or five days prior to an accident. Under such circumstances, it is a question of fact for the jury to determine whether the mine operator was negligent in failing to remedy the dangerous condition of the wire.

Virginia Iron, Coal & Coke Co. v. Prophet (Virginia), 93 Southeastern, 590, p. 591.

LIABILITY FOR INJURIES—QUESTION OF FACT.

In an action for damages for the death of a miner caused by a live electric wire used in a haulageway the jury is justified in finding the mine operator guilty of negligence in permitting a live electric wire to swing down and hang some 2 feet below its proper position because of the insulators becoming detached, with a knowledge of the dangerous situation and where the attention of the mine boss in charge of the entry had been called to the condition of the wire four or five days prior to the time of the accident.

Virginia Iron, Coal & Coke Co. v. Prophet (Virginia), 93 Southeastern, 590, p. 591.

CARE AS TO USE OF ELECTRIC WIRE.

The omission of a mine operator to use ordinary care to make a fallen electric wire reasonably safe, after knowledge of its unsafe condition, or who by ordinary care might have known of the defective condition, is negligence.

Virginia Iron, Coal & Coke Co. v. Prophet (Virginia), 93 Southeastern, 590, p. 591.

DEGREE OF CARE REQUIRED BY EMPLOYER.

Ordinary care exercised by mine operators and others who make a business of using electricity for a profit to prevent injury to employees and others therefrom requires much greater precaution in its use than where the element used is of a less dangerous character. As there is greater danger and hazard in the use of electricity, there must be a corresponding exercise of skill and attention for the purpose of avoiding injury to another, to constitute what the law terms ordinary care. The care must be commensurate with the danger. But as a matter of law a mine operator using electricity is not bound to exercise the greatest care and prudence to prevent injury to his employees, as this would impose upon an employer a higher degree of care than that described and defined as "ordinary care."

Whalen v. Union Pacific Coal Co. (Utah), 168 Pacific, 99, p. 104.

When a mine operator is using in the conduct of his business an agency so subtle and deadly as electricity in places where miners have the right to go and be, the highest degree of skill and care attainable should be exercised to protect the miners from danger.

West Kentucky Coal Co. v. Key (Kentucky), 198 Southwestern, 724, p. 727.

DEGREE OF CARE REQUIRED—CONSTRUCTION AND MAINTENANCE.

It is the duty of a coal-mine operator, where it uses electrical appliances in its coal mines and its wires carry a deadly or dangerous current of electricity, to use the utmost care and skill in the construction, management, and maintenance thereof; and it is its duty to exercise and use the utmost care and skill to properly support such wires and to keep them in repair. The duty as to the proper construction is as necessary to their safety as to their maintenance after construction.

West Kentucky Coal Co. v. Key (Kentucky), 198 Southwestern, 724, p. 726.

LIVE ELECTRIC WIRE—LIABILITY FOR INJURY FROM.

A coal-mining company maintained an electric railway over which its miners were transported from their working places to the main slope leading to the surface. The entry or tunnel through which the electric railway passed varied with the height or thickness of the seam of coal, but there were few if any places where the distance between the floor and roof was less than 6 feet. The trolley wire

feeding the motor was maintained about 5 feet 7 inches above the track and 14 inches horizontally outside of and away from the tracks. It was impractical to increase the height of the entry by breaking the roof as it existed at the time the coal was mined and removed therefrom, as this would create an additional element of danger. The mining company is not to be charged with negligence in maintaining the live trolley wire at the height of 5 feet 7 inches above the track where it would produce a more dangerous situation to break the roof in order to have the wire at a greater distance from the floor of the entry.

Whalen v. Union Pacific Coal Co. (Utah), 168 Pacific, 99, p. 101.

BREAKING OF ELECTRIC FEED WIRE—LIABILITY OF OPERATOR.

A trip rider employed by a mine operator while riding on a trip of cars and seated on an electric motor was, by reason of the breaking and sagging of the feed wire, caught by the wire and thrown under the motor and received injuries for which he sued. The wire and hanger supporting it had been in use for many years, and there was a bright spot near the place where the wire broke which indicated a worn condition. It did not appear that any minute examination or inspection of either the wire or hanger was ever made or that either was ever subjected to any test. Both the wire and hanger were subjected many years to the constant friction from the trolley wheel, and there was evidence tending to show that the worn condition of the wire was observable and if the hanger had been in proper condition it would not have permitted the wire to sag. Such evidence was sufficient to make the question of the coal company's negligence one of fact to be submitted to and determined by the jury.

West Kentucky Coal Co. v. Key (Kentucky), 198 Southwestern, 724, p. 726.

DUTY TO WARN OR INSTRUCT.

HAZARDOUS UNDERTAKING—COMPETENCY OF EMPLOYEE—WARNING EXCUSED.

Where a person of full age who for more than two years had been employed in and about various mines, had seen others at work drilling and blasting rock with powder and who had worked as a miner sufficiently long for his own experience to have taught him the dangers attending the use of powder for blasting, seeks employment as a miner from a mine operator, the mine operator has the right to assume that such person has sufficient knowledge and skill to properly discharge the duties of the employment he seeks; and if he was not skilled in the use of powder in blasting he should, when directed to do such work, have informed the operator of his lack of experience and want of skill in the use of such dangerous agency.

Olsen v. Triangle Min. Co. (Utah), 167 Pacific, 813, p. 815.

ASSURANCE OF SAFETY.

RIGHT OF MINER TO RELY UPON.

A miner was employed to remove from a room slate that had fallen. It was no part of his duty to inspect the roof, and he was under no duty to look out for the safety of the place where he was working. It was the duty of the mine foreman to inspect the roof at least once each day so as to protect the miner and others working thereunder from danger. At the time the miner was directed to go to this place to work he objected, because he thought the place was dangerous. The mine foreman informed him that the slate had fallen out, that the roof had become arched and the room was then a safe place in which to work. The foreman at that time went to the place with the miner, inspected it, and assured him of its safety. The place was not obviously dangerous, and the roof did not appear unsafe at the time the miner began working under it. Under such circumstances the miner had the right to rely upon the assurances of the mine foreman as to the safety of the place in which he was directed to work.

Consolidated Coal Co. v. Spencer (Kentucky), 197 Southwestern, 1069.

Where a miner is employed and where it is his duty to make his working place safe, and this he did by pulling down the loose slate or by propping the slate, the mere assurance of safety will not constitute a ground of recovery or impose any liability upon the mine operator.

Lyttle v. Rex Coal Co. (Kentucky), 197 Southwestern, 1070, p. 1071.

Where a mine operator especially delegated to an employee or to one acting as his vice principal the duty of making an inspection of the quarry operations as they proceed, an employee working in the quarry may rely upon the assurances of safety made by such vice principal and proceed with his work, and the quarry operator is liable for injuries received by the employee while so working. The rule applies with particular force where the employer or the vice principal is a man of large experience and the employee has had but limited experience in the particular work.

Gray Eagle Marble Co. v. Perry (Tennessee), 197 Southwestern, 674.

ASSURANCE OF SAFE PLACE—DIRECTIONS TO WORK.

A conversation between a mine foreman and a miner some 60 feet distant from the miner's working place, where in answer to an inquiry by the mine foreman as to why the miner was not loading, the miner informed the foreman that he had just shot and there was too much smoke. The foreman said to the miner in substance: "I will go and shut the trapdoor on the main entry and you go on back to work." The purpose of closing the trapdoor was to remove the smoke, of

which the miner complained. The foreman did not direct the miner to go back to his work and in the meantime he would close the door; and the conversation can not be construed to be meant as a command to return to work until the trapdoor was closed, and in no sense was it an assurance of safety or that the miner's working place was safe, as the miner himself knew that the foreman had not been nearer than the 60 feet of his working place.

Gregg v. Stonega Coke & Coal Co. (Kentucky), 198 Southwestern, 5.

MINER MAY ASSUME PLACE IS SAFE.

A miner has a right to assume, in the absence of apparent defects, that the place in which he is ordered to work by a shift boss is safe, and he is not bound to inspect it for the purpose of discovering latent defects, and where a miner is directed to work in a certain place he has a right to act on the presumption that the mine operator has made his place of work reasonably safe.

Cnkovch v. Success Min. Co. (Idaho), 166 Pacific, 567, p. 570.

ASSUMPTION THAT OPERATOR HAS PERFORMED DUTY.

It is the duty of a mine operator to furnish his miners a reasonably safe place in which to perform the work assigned to him, and the miner has the right to assume that the operator has performed this duty. If an injury results from the failure to perform this duty the operator is liable, unless a reasonably prudent and intelligent man under like circumstances would have been able to discern the defects and failed to do so, thereby contributing to his injury. It is the duty of a mine operator to have the rooms in the mines inspected and see if they are in a reasonably safe condition for the miners to work.

Consolidation Coal Co. v. Bailey (Kentucky), 198 Southwestern, 561, p. 562.

A mine operator can not escape liability for his failure to perform a statutory duty on the ground that he did not know that the place was dangerous or that loose rock was likely to fall. A mine operator can not say that because an injured miner was experienced he was guilty of contributory negligence where no duty was imposed upon the miner to keep careful watch to see that loose rock did not fall upon him. Where the statute imposes this duty upon the operator, a miner has the right to rely upon the performance by the mine operator of the statutory duty to inspect and keep the roof of the entries propped to prevent stone from falling. The assumption by the mine operator that he was only bound by ordinary diligence to furnish a safe place for his miner to work would deprive the statute of all its force. A court can not assume that the legislature intended merely to declare that to be the duty of a mine operator which the common law already imposed upon him.

McAlester-Edwards Coal Co. v. Hoffar (Oklahoma), 166 Pacific, 740, p. 742.

RULES AND REGULATIONS.**FAILURE TO PROMULGATE RULES—EFFECT ON NEGLIGENCE.**

In the absence of evidence showing that rules would be useful or feasible under the circumstances, an employer can not be found negligent in not having promulgated a set of rules. Where the very nature of the employment makes it dangerous and the dangers incident thereto and growing out of it are of common knowledge and are fully known to and understood by the employee, and where the safety of others can not be imperiled in any way by any act or omission of one employee in the performance of his duties and his safety depends wholly upon the degree of skill, care, and caution used by the employee himself and not upon that of his fellow employees, the employer can not be held liable on account of his failure to furnish his employees with rules for the government of the employment, and under such circumstances the absence of rules is not proof of negligence on the part of the employer.

Olsen v. Triangle Min. Co. (Utah), 167 Pacific, 813, p. 816.

PROOF OF EXISTENCE OF RULES.

In an action by a coal miner for damages for injuries received while assisting in the operation of a coal-cutting machine, where the proof of the existence of a certain rule requiring the machine operator and his helper to carefully examine their working place for a dangerous roof and to see as the work progressed that the roof was not becoming unsafe, it is the duty of the court to instruct the jury as to the existence of the rule and the effect of disobedience of the rule. But where, in addition to the proof of such a rule, there was some proof tending to show that an old and different rule was in force, it was proper for the court to instruct the jury as to the effect of the violation of the rule, but the fact of the existence of the rule was to be determined by the jury under the contradictory evidence.

Consolidation Coal Co. v. Bailey (Kentucky), 198 Southwestern, 561, p. 563.

DANGEROUS EMPLOYMENT—RULES NECESSARY.

There are certain kinds of employment where, on account of their nature, it becomes necessary and it is the duty of an employer to promulgate and publish rules and regulations for the guidance and governance and safety of the employees. This is especially true where a large number of persons are at work and the danger or safety of the employment depends largely upon all the employees performing their duties promptly at stated times and in a given manner.

Olsen v. Triangle Min. Co. (Utah), 167 Pacific, 813, p. 816.

HAZARDOUS BUSINESS—RULES AND REGULATIONS.

A mine operator or other employer is not justified in conducting a hazardous and complicated business without some system of rules and regulations calculated to lessen the risks his employees will necessarily incur while engaged in their employment. But this principle has no application where a single employee was engaged in the performance of all the duties attending the work at the time of his injury, and where he was sufficiently mature in years and in experience to understand and appreciate the duties attending the work and where it is apparent that a system of rules would not in the slightest degree avoid the accident and resulting injuries.

Olsen v. Triangle Min. Co. (Utah), 167 Pacific, 813, p. 815.

DELEGATION OF DUTY.**NONDELEGABLE DUTY.**

The duty of an employer to furnish a reasonably safe place for his employees to work in and reasonably safe tools and appliances for the employees to work with is a nondelegable duty.

Wolverine Oil Co. v. Kingsbury (Oklahoma), 168 Pacific, 1021, p. 1022.

MINER'S WORKING PLACE—SAFE PLACE.**APPLICATION OF SAFE-PLACE DOCTRINE.**

The safe-place doctrine and the duty of a mine operator to furnish a miner a sufficient working place applies where the operator selects the place and directs the miner to work at and in such place, and where the miner himself in no way creates the place or changes it by the work he is engaged in doing pursuant to the directions given, and where the dangers are from outside sources and over which the miner has no control and which are not within his view.

Clinchfield Coal Corp. v. Ray (Virginia), 93 Southeastern, 601, p. 604.

FAILURE OF OPERATOR TO EXERCISE CARE.

A miner engaged in mining coal was by the mine foreman taken to another part of the mine and directed to repair the tracks in a haulageway. The tracks had spread, thereby permitting cars to become derailed, and while the miner was engaged in repairing the tracks another miner pushed a loaded car down the track that became derailed, and the miner who had been directed to repair the track, while engaged in such work and in assisting to place the loaded car back on the tracks, was injured by a collision from a trip of empty cars being pushed into and through the haulageway. The mine foreman knew of the situation, the condition of the track, and the duty of the miner to make the repairs. He knew as he walked out of the haulageway that a motor was pushing or would push

empty cars into such haulageway; he knew also that the place where the miner worked was not lighted, and that there were no lights on the empty cars pushed into such particular haulageway. Under these circumstances the mine operator was justly found guilty of actionable negligence in not exercising due care to provide the miner a safe working place.

Clinchfield Coal Corp. v. Ray (Virginia), 93 Southeastern, 601, p. 604.

MINER MAKING WORKING PLACE.

The rule requiring a mine operator to furnish a miner a safe place to work does not apply where the miner himself is charged with the duty of taking down the slate for his own protection, and where the perils to which he is subjected were of his own creation.

Gregg v. Stonega Coke & Coal Co. (Kentucky), 198 Southwestern, 5.

MINER INJURED WHILE MAKING PLACE SAFE — LIABILITY OF OPERATOR.

A miner injured while taking down draw slate from his working place can not recover damages from the operator for injuries where it was the miner's duty and the miner had assumed the duty of propping and taking down the slate and himself making his working place safe. The safe-place doctrine has no application under such circumstances.

Lyttle v. Rex Coal Co. (Kentucky), 197 Southwestern, 1070, p. 1071.

Gregg v. Stonega Coke & Coal Co. (Kentucky), 198 Southwestern, 5.

RELATIVE DUTY OF OPERATOR AND MINERS.

As the work of mining progresses in a mine under some circumstances there comes a time when it is a question as to what is the working place of the miner, and whether it has passed out of his control and the duty devolved upon the operator to look after the roof. It becomes a question where the miner's duty ceases and the employer's duty begins and especially where the limits of the miner's working place are not defined or fixed by statute. If as a fact to be established by the proof, the miner in the progress of his work and his working place have passed beyond the point in controversy and that part of his room has become in fact a roadway for taking out the coal, then the duty would devolve upon the operator to secure the roof. But these are questions of fact to be submitted to and determined by a jury.

Mitchell v. Phillips Min. Co. (Iowa), 165 Northwestern, 108, p. 112.

DUTY OF INSPECTION.

A miner was injured by a fall of slate from the roof at a place where he was directed by the mine foreman to load out slate that had fallen and with the assurance of the foreman that the place was safe. Where it was the duty of the foreman and not of the miner to inspect

the roof, proof that, when loading out coal, it was the duty of the miner to inspect and make safe the roof under which he was working is not available to a mine operator in an action by the injured miner for damages, where the mine foreman admitted that the kind of work the miner was doing at the time of the accident imposed upon the operator and not upon the miner, the duty of inspecting and maintaining in a safe condition the place where he was working.

Consolidated Coal Co. v. Spencer (Kentucky), 197 Southwestern, 1069, p. 1070.

BLASTING—DUTY OF MINER AS TO SHOTS.

A miner whose duty it is to prepare and fire the blasting charges in his working place must observe and take the precaution for himself that miners generally do while engaged in such work. The procedure of a miner always counting his shots to determine an explosion from each of his charges of powder is thoroughly well known, recognized, and universally followed by miners. No miner can be entirely safe unless he thoroughly examines each of the places where he puts any charge of powder and there is no way in which the danger of injury can be avoided except a careful observation by the miner himself of the places where he has put the explosive in the holes.

Olsen v. Triangle Min. Co. (Utah), 167 Pacific, 813, p. 816.

DUTY OF MINER TO PROP.

The duty is upon a miner to prop the roof of his working place and a coal mining company can not be charged with negligence in failing to prop the roof of a miner's working place.

Hyden v. Stearns Lumber & Coal Co. (Kentucky), 198 Southwestern, 775.

KNOWLEDGE OF DEFECTS—INSUFFICIENT PLEADING.

A plea or answer to a complaint by a miner for damages for injuries caused by a fall of rock from the roof of the mine where the plaintiff was working is insufficient where it avers that at the time the plaintiff sustained the injuries he was engaged in mining ore as an employee of the defendant operator, and while so engaged a piece of rock became loose and was likely to fall and such fact was known to the plaintiff. It also averred that the duty of the plaintiff was either to pull down the rock or to notify the mine boss that the rock was loose and not to go under it until a timber had been set by the proper employee. The plea charges the complainant with the knowledge of the defect but not with a knowledge of the danger and charges the duty to the plaintiff in the alternative either to remove the rock or to notify the mine boss. There is no averment that the complainant did not discharge the duty of notifying the mine boss

and only inferentially charges that he did not pull down the rock. The averments of the plea admit the injury could have been the proximate cause of the negligent failure of the operator's agent after such notice to promptly remedy the defect within a reasonable time thereafter. The plea does not charge the complainant with a knowledge of the danger or that it was open or obvious.

Clinton Min. Co. v. Bradford (Alabama), 76 Southern, 74, p. 77.

MINER'S SCOPE OF EMPLOYMENT.

SCOPE OF EMPLOYMENT—PLEADING.

In an action by a miner for damages for injuries received while working in a mine it is sufficient to show that the injuries were received within the scope of the miner's employment where he averred in his complaint that at the time he received the alleged injuries he was acting within the line and scope of his employment with the mine operator.

Clinton Min. Co. v. Bradford (Alabama), 76 Southern, 74, p. 76.

NEGLIGENCE OF FOREMAN, OFFICER, OR VICE PRINCIPAL.

WHAT CONSTITUTES—EMPLOYEE IN CHARGE.

An employee in charge of an employer's business or any department thereof, whose duties are exclusively supervisory and who is in the direction and control of the work of all subordinate employees engaged therein, whose duty it is to obey him, is a vice principal, although he may be subject to general orders or superintending control of a general manager.

Wolverine Oil Co. v. Kingsbury (Oklahoma), 168 Pacific, 1021, p. 1022.

NEGLIGENCE OF VICE PRINCIPAL.

There are certain absolute or nondelegable duties which the law casts upon an employer for the protection of his employees; and an employee, of whatever rank, to whom the master delegates the performance of such duties is his vice principal and not a fellow servant. In all such cases the employer is liable to a miner for injuries due to the negligence of such vice principal in the performance of such duties.

Wolverine Oil Co. v. Kingsbury (Oklahoma), 168 Pacific, 1021, p. 1022.

EVIDENCE—DECLARATIONS OF VICE PRINCIPAL—PROOF.

The declarations of a superintendent of an oil company as a vice principal made within the scope of his authority and while transacting the business of his principal, may properly be admitted in evidence.

Wolverine Oil Co. v. Kingsbury (Oklahoma), 168 Pacific, 1021, p. 1022.

HOISTING ENGINEER.

A hoisting engineer employed by a mine operator to run and operate the engine and machinery that raise and lower the cage by which miners enter the mine, is a vice principal of the corporation and was employed to do work which could only be done by the company. A mining company is responsible for the manner in which the hoisting engineer does his work and can not even if desired, evade the responsibility or shift the burden to the shoulders of another. The negligence of the hoisting engineer is under such circumstances the negligence of the mining company and a complaint in an action by a miner for injuries caused by the negligence of the engineer may properly charge both the engineer and the mining company with negligence. The failure of proof to show negligence in the employment of the engineer can not in any way affect the allegations charging both the engineer and the mining company with negligence in operating the cage, and that was the proximate cause of the injury complained of.

Farnon v. Silver King Coalition Mines Co., (Utah), 167 Pacific, 677.

NEGLIGENCE OF FELLOW SERVANT.

WHO ARE FELLOW SERVANTS—BOTTOM BOSS.

A person known as a "bottom boss" had the direction of the bottom men and in the absence of the mine manager, directed the motor drivers where to stop or place the cars when they came to the bottom and also gave directions for the distribution of the empties. He was not authorized to give motor drivers any orders or instructions as to what they should do or as to how they should run their motors after they left the bottom or main entry or as to how they should drive over the crossovers or runarounds in going for the empties. He received special orders each morning and noon as to what he should direct or tell the men to do and it was his duty to carry out these orders exactly as given; he only controlled the movements of the loaded and empty cars when they came to the bottom to be hoisted. Under such a state of facts, the bottom boss is not a fellow servant of a motor driver and does not stand as to a motor driver in the position of vice principal and is entitled to recover for injuries caused by being run over by a motor in a cross passage by reason of the negligence of the mine operator.

Daly v. New Staunton Coal Co. (Illinois), 117 Northeastern, 413, p. 415.

WHO ARE FELLOW SERVANTS—RULE IN KENTUCKY.

The courts of Kentucky are committed to the doctrine of the "association theory" or in other words, an employer will not be excused for negligence resulting in injury to one employee which is inflicted by another employee, unless such employees are so engaged

and situated so that each by carefulness and attention in the performance of his duties may protect himself from injury caused by the negligence of the employee with whom he is working. This rule has been applied to two drivers in a mine, each driving mules attached to different trips of cars; to motormen operating different cars in the same mine; to operators of separate cars in a rock quarry hauling rock to a crusher, and to employees, one operating a trip of empty cars and another on a different track operating a trip of loaded cars. In each of these instances the employees have been held not to be fellow servants.

Harris v. Rex Coal Co. (Kentucky), 197 Southwestern, 1075.

MINERS OPERATING DIFFERENT TRIPS OF CARS.

It was the duty of one miner to receive loaded cars from a mine at the foot of an incline, and conduct them across a trestle to the tippie. It was the duty of another employee, a hostler, to take the empty cars up the incline, release the cable, and take the cars into the mine. The hostler while taking a trip of empties up the incline negligently and prematurely detached the cable before the trip reached the top, thereby causing the trip of empty cars to run down the incline and against and upon the other miner, who was taking the loaded cars across the trestle. The two employees were operating separate cuts of cars, were in no way associated with each other, and neither was in position to see or know what the other was doing or how he was performing his duty. Under such circumstances such employees can not be held to be fellow servants under the rule adhered to by the courts of Kentucky.

Harris v. Rex Coal Co. (Kentucky), 197 Southwestern, 1075.

HOISTING ENGINEER NOT FELLOW SERVANT.

A hoisting engineer employed by a mine operator to run and manage the engine that raises and lowers a cage from one level to another, is not a fellow servant with a miner injured by the negligent dropping of the cage.

Farnon v. Silver King Coalition Mines Co. (Utah), 167 Pacific, 677.

CONTRIBUTORY NEGLIGENCE OF MINER.

PLEADING CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF PLEA.

A plea of contributory negligence is not sufficient where it merely states a conclusion of law; but it must aver the facts constituting the negligence and the facts so averred must be such that a conclusion of negligence follows therefrom as a matter of law.

Clinton Min. Co. v. Bradford (Alabama), 76 Southern, 74, p. 77.

Harris v. Rex Coal Co. (Kentucky), 197 Southwestern, 1075, p. 1077.

Sloss-Sheffield Steel & Iron Co. v. Harrison (Alabama), 76 Southern, 47, p. 48.

A plea of contributory negligence is not sufficient where it avers in substance that there was a safe way to perform the work and labor which the deceased miner was doing at the time a dipper fell upon and injured him and that the intestate failed and refused to perform the work in the safe way and placed himself within a few feet of the car being at the time loaded, where he knew derricks might fall on him or the dipper might strike him, and remained in said place while the dipper was swung over the car and fell and thereby caused his death.

Sloss-Sheffield Steel & Iron Co. v. Harrison (Alabama), 76 Southern, 47.

A plea of contributory negligence to be sufficient must go beyond averring negligence as a conclusion and must aver a state of facts to which the law attaches that conclusion.

Sloss-Sheffield Steel & Iron Co. v. Harrison (Alabama), 76 Southern, 47, p. 48.

Clinton Min. Co. v. Bradford (Alabama), 76 Southern, 74, p. 77.

Harris v. Rex Coal Co. (Kentucky), 197 Southwestern, 1075, p. 1077.

In an action for the death of a miner caused by the negligence of a mine operator, the mine operator filed an attempted plea of contributory negligence as follows: "The defendant says that the deceased contributed to his own injury from which he died." This is not a good plea of contributory negligence as it does not allege that the deceased was negligent, and that his negligence contributed to his injury, but for which the injury would not have occurred, all of which allegations are necessary to such a pleading.

Harris v. Rex Coal Co. (Kentucky), 197 Southwestern, 1075, p. 1077.

Sloss-Sheffield Steel & Iron Co. v. Harrison (Alabama), 76 Southern, 47.

Clinton Mining Co. v. Bradford (Alabama), 76 Southern, 74, p. 77.

PLEADING AND INSTRUCTIONS.

When specific facts are alleged as constituting contributory negligence on the part of a miner suing for damages for injuries the instructions of the court to the jury on the trial of the case should be confined to the specific facts stated; but where in such case the mine operator pleads contributory negligence in general terms and introduces evidence under such a plea, he is entitled to a special instruction on such negligence in which the facts are grouped and the law applied thereto; and a refusal on the part of the court to give such instructions is error.

Consolidation Coal Co. v. Bailey (Kentucky), 198 Southwestern, 561, p. 563.

QUESTION OF FACT.

Whether or not a track repairer who had stopped his work and was injured by a collision of empty cars while he was engaged in assisting to replace a loaded car on the tracks, was guilty of contributory negligence in failing to look for or see or get out of the way of the empty

cars was a question to be determined by the jury in an action by him for damages for the injuries sustained.

Clinchfield Coal Corp. v. Ray (Virginia), 93 Southeastern, 601, p. 604.

QUESTION OF LAW OR FACT.

The statute of Virginia enacts under penalty that no person shall travel on foot to and from his work upon any slope, engine plane, or motor road where another good road is provided. But a court can not say as a matter of law in case a miner while traveling on foot to his work on a motor road was guilty of contributory negligence where there was evidence tending to show that the roof of the manway was not safe and there was evidence tending to prove a custom for miners and employees to go into the mine on the motor road and take the cars inside of the mine. Under such circumstances it is a question of fact whether the method adopted by the miner was authorized and sanctioned by the mine operator, and if it was the miner was not guilty of contributory negligence.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 373.

QUESTION OF FACT—FAILURE TO INSPECT WORKING PLACE.

A helper in operating an electric coal-cutting machine was injured by a fall of slate from the roof of the mine. A rule of the mine operator imposed upon the operator of a coal-cutting machine and of his helper the duty of careful examination of the roof and to satisfy themselves that it was safe. The room in which the accident occurred had been cleared and propped the usual distance by the coal loaders, a part of whose duties were to secure the room and have it in readiness for the machine operator and his helper. The proof showed that it was not in this particular part of the room that the helper was injured by the falling slate. The proof also showed that the mine foreman knew of the bad condition of the roof and that the machine helper did not know that fact, although he had picked a hole or place in the roof for the purpose of setting a jack, but he had not been in the room before he began to work there and knew nothing of its condition. Under the established facts a court can not say as a matter of law that the helper was guilty of contributory negligence or that he was negligent in not making a proper examination or inspection of the roof and that this negligence contributed to his injury.

Consolidation Coal Co. v. Bailey (Kentucky), 198 Southwestern, 561, p. 562.

BURDEN OF PROOF.

In an action for damages for the death of a miner due to the alleged negligence of the mine operator in not properly adjusting a live electric wire and by reason of which the driver was killed, the

burden of proving contributory negligence rests upon the defendant, the mine operator, unless the fact of contributory negligence appears from the plaintiff's own evidence.

Virginia Iron, Coal & Coke Co. v. Prophet (Virginia), 93 Southeastern, 590, p. 591.

NEGLECT OF DUTY.

Contributory negligence is a delict or neglect of duty by an employee and he can not recover for a delict of his employer even in the violation of a statute, if his own delict has contributed to his injury as a proximate cause.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 372.

KNOWLEDGE OF DANGER—OPERATOR'S WANTON NEGLIGENCE.

A recovery by a miner for damages for injuries caused by a fall of rock from the roof is not to be defeated because the miner knew of the dangerous condition of the roof and that a prop was needed and knew that props had not been furnished, and although, he continued after such time to make conditions more dangerous by the work he was doing, where the evidence shows that the mine operator had knowledge of the dangerous condition of the roof and notwithstanding said knowledge "grossly and wantonly and recklessly permitted said roof to remain in said defective condition and plaintiff was proximately injured from said gross and wanton negligence."

Clinton Min. Co. v. Bradford (Alabama), 76 Southern, 74, 76.

KNOWLEDGE OF DANGER—MAKING DANGEROUS PLACE SAFE.

A miner was employed to assist in the work preliminary to installing a telephone line, and his duty was to assist in cutting a groove for the wire along the side of an entry and the taking down of all loose coal above the groove that by falling or sinking might close the groove and break the wire. In the progress of the work he and a miner assisting him reached a place in the entry where the coal was drummy. The miner assisting warned the other not to dig there as the overhanging brow of loose coal if dug under would fall; the other believing he could knock out enough coal to clear the line proceeded, and while so engaged the coal fell, producing injuries from which he died. Under such circumstances there can be no recovery for the death of the miner for three reasons: First, no negligence can be imputed to the mining company in relation to the injury; second, the miner himself was clearly negligent and his negligence was the sole cause of the accident; third, he was employed to remove the drummy coal so that the telephone line might not be interfered with or broken by any subsequent fall.

Dodd v. Pocahontas Consol. Collieries Co., 244 Federal, 151, p. 153.

KNOWLEDGE OF DANGER—VIOLATION OF RULES.

Empty cars drawn by an electric motor supplied by an overhead feed wire were used by a mine operator to haul the miners at the end of their shift to the foot of the mine slope to be taken out of the mine. The miners at the end of the shift collected at a certain place, the cars brought to and stopped near by, and the current turned off of the wire above the empty cars before the miners were permitted to board them. The boarding of the cars before they were stopped and before the current was turned off was extremely dangerous and hazardous, and this fact was well known to all the miners. A miner who with knowledge of the dangers and who over the protest, commands, and warning of a foreman and safety-first man, attempted to get on the front car of the trip before the cars were stopped and before the current was turned off, and to avoid the probable inconvenience of waiting 10 or 15 minutes to be carried out of the mine after arriving at the slope, was, as a matter of law, guilty of contributory negligence and such negligence was the proximate cause of his death.

Whalen v. Union Pacific Coal Co. (Utah), 168 Pacific, 99, p. 104.

OBVIOUS DANGER.

In order to charge an injured miner with contributory negligence and defeat his right of recovery, the dangers, and not the defects merely, must have been so obvious and threatening that a reasonably prudent man would have avoided them.

Cnkovich v. Success Min. Co. (Idaho), 166 Pacific, 567, p. 570.

DANGER NOT IMMINENT.

An action for the death of a miner killed by a fall of slate can not be defeated on the ground of contributory negligence from the fact that the miner went under parting slate without props, where it appeared that before going under the slate the deceased, in a proper manner examined and tested the slate in the presence of another miner and that in the judgment of this miner and presumably in the judgment of the deceased, it was safe to proceed under the slate and where there was some evidence tending to prove that the danger was neither obvious nor imminent.

Thacker v. Shelby Coal Min. Co. (Kentucky), 197 Southwestern, 633, p. 634.

RISK OF DANGER TO AVOID INCONVENIENCE.

When the question is one of mere convenience and not of actual danger, some moderate risk may be taken if there is no obvious danger. But a miner will be chargeable with contributory negligence if he takes the risk of an obvious and serious danger merely to avoid inconvenience or to save a few minutes time.

Whalen v. Union Pacific Coal Co. (Utah), 168 Pacific, 99, p. 104.

MINER'S VIOLATION OF OPERATOR'S ORDER.

Under some circumstances a violation of an order of a mine operator by an employee might not amount to more than contributory negligence but a willful violation of a direct and positive order of a mine operator by a miner and by reason of which the miner lost his life, will be sufficient to defeat an action for damages for the death, although the mine operator violated the statute, but his violation of the statute was not the proximate cause of the miner's death.

Randall v. Crescent Coal Co. (Illinois), 117 Northeastern, 773, p. 777.

MINER STANDING ON MOTOR TRACK IN ENTRY.

Certain employees and miners while entering a mine on foot were warned of a trip of empty cars coming rapidly on the other track leading into the mine. There was a space sufficient for the miners to stand between the tracks in safety; but to avoid the empty cars a miner stepped back near to and upon the other track and while the empty cars were passing at a rapid rate and making a loud noise, a trip of loaded cars, without any light on the front of the car or any signal or warning of any kind, was being pushed by a motor out of the mine on the opposite track and struck and killed the miner. It was a violation of the statute of Virginia to push the trip of loaded cars out of the mine without a light on the front car; and to hold that without such warning it is contributory negligence per se for a miner to stand on a track in the narrow space of a coal mine because there is another sufficient place to stand would be to exact as a matter of law perfection of carefulness.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 373.

ASSUMPTION OF RISK.**RISKS ASSUMED.****ORIGIN OF ASSUMPTION OF RISK.**

Assumption of risk rises either out of the contract or status of employment as an incident to it, or out of the status of relation voluntarily assumed and continued by the employee toward the instrumentalities of the employer.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 372.

DOCTRINE OF ASSUMED RISK.

Assumption of the risk of a business inherently dangerous but conducted with due care is a doctrine evidently fair and just.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 371.

RISKS INCIDENT TO SERVICE.

A coal miner assumes the risk of dangers which are ordinarily incident to the services or that are open and obvious which the law will infer are so known to him.

Clinchfield Coal Corp. v. Ray (Virginia), 93 Southeastern, 601, p. 604.

RISKS KNOWN AND APPRECIATED.

A coal miner assumes the risk of dangers which are known to and appreciated by him.

Clinchfield Coal Corp. v. Ray (Virginia), 93 Southeastern, 601, p. 602.

DEFENSES—PLEADING.

Assumption of risk on the part of an employee or miner is an affirmative defense to be established by the mine operator. A mine operator who pleaded assumption of risk as a defense to an action by a miner injured by the failure of the operator to place a light on a trip of cars, can not successfully interpose such defense, where he must assert and prove, as one of the elements, his own violation of a penal statute. The rule is that no one can assert an affirmative claim of any kind where one of its essential elements is his own violation of a criminal statute.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 372.

OBVIOUS DANGER.

A skilled mechanic, a carpenter, a part of whose duties was to inspect and keep in repair a place in the mine tracks assumed the risk where the danger of attempting to replace a loaded car upon the tracks was obvious.

McMennimen v. Lehigh Valley Coal Co. (Pennsylvania), 101 Atlantic, 735, p. 736

KNOWLEDGE OF DANGEROUS ELECTRICAL APPLIANCES.

A coal mining company used an electric motor to haul the cars through the various entries and on which at quitting time the miners rode to the foot of the shaft or slope. The trolley wire or feed wire was at the top of the entry about 5 feet 7 inches above the track. When the cars were brought up for the miners to board, to be carried through the entry, they were stopped and the miners boarded the car on the side opposite the trolley wire. The miners employed were all familiar with the situation, the condition and danger of the trolley wire, and the necessity of boarding the car from the side opposite the feed wire. Under these circumstances the miners in boarding the car and in riding in and out of the mine assumed the risk of the danger from the live trolley wire and the electrical appliances.

Whalen v. Union Pacific Coal Co. (Utah), 168 Pacific, 99, p. 104.

CHANGING CONDITIONS OF MINER'S WORKING PLACE.

The doctrine of assumption of risk applies to a miner's working place, where such working place is constantly changing by reason of the operations of the miner himself.

Clinchfield Coal Corp. v. Ray (Virginia), 93 Southeastern, 601, p. 604.

MINER'S WORKING PLACE—KNOWLEDGE OF DANGER.

An experienced miner had fired two shots for the purpose of loosening the coal at his working place. He had gone to a breakthrough some 60 feet distant when the shots were fired, and waited for the smoke to clear away. The mine foreman who met him and learned of the shots and the smoke, informed the miner that he would go 1,000 feet distant and close a trapdoor so that the smoke would disappear; but without waiting for the trapdoor to be closed and the smoke to clear away, the miner returned immediately to his work. He had just loosened the coal by firing two shots, and he knew that the roof support had thus been removed, and that there was nothing to prevent the slate from falling. He admitted that the smoke was so thick that he could not see. Under these circumstances he must be held to have assumed the risk of the danger.

Gregg v. Stonega Coke & Coal Co. (Kentucky), 198 Southwestern, 5.

WARNING—OPERATOR'S FAILURE TO COMPEL OBEDIENCE—LIABILITY.

It is sufficient where a coal-mine operator promulgates and attempts in reasonable ways to enforce a rule governing the conduct of miners in a particular instance. A coal-mine operator used an electric motor and cars for conveying the miners from their working places at quitting times through the entries to the foot of the shaft or slope. The rule was that the miners should not board the cars until brought to a standstill at the place where the miners collected and until the current was turned off of the part of the feed wire that extended over the empty cars, and then the miners were to board the cars from the side opposite the feed wire and in no other manner. It required two trips to take an entire shift up the main slope, and the miners who first boarded the cars had the advantage of taking the first trip up the slope. To gain this advantage the miners sometimes boarded the cars from the ends and sometimes before the cars were stopped and the current turned off. The operator kept a foreman, known as a "safety-first," man at the place and at the times where the miners collected for the purpose of warning them and preventing them from boarding the cars until stopped and the current turned off. At the time one of the miners was killed by coming in contact with the live wire and for which the operator was sued, the safety-first man did all that was reasonable and all that was within his power, except the use of physical force to prevent the miners, including the deceased, from boarding

the cars before they were stopped and the current turned off. The operator could not be expected or required to do more in an honest endeavor to enforce the rule and can not be held liable for the death of the miner where the deceased, together with others by their force of numbers, pushed by and disregarded the warning and protest and commands of the safety-first man. The operator could not be expected, and certainly was not required, to use physical force to prevent the deceased and the other miners from boarding the cars prematurely.

Whalen v. Union Pacific Coal Co. (Utah), 168 Pacific, 99, p. 104.

DANGEROUS CONDITION OF ROOF.

A rule in a mine where an electric coal-cutting machine was used required the operator of the machine and his helper to inspect and to keep propped and in safe condition the roof of the part of the room in front of the coal-cutting machine. Under such a rule neither the machine operator nor his helper assumes the danger of any part of the room which they are not required to inspect or make safe as they proceed in the cutting of the coal.

Consolidation Coal Co. v. Bailey (Kentucky), 198 Southwestern, 561, p. 562.

MINER USING DEFECTIVE COAL-CUTTING MACHINE.

A miner was furnished a coal-cutting machine that was defective and badly out of repair. He was an experienced miner and had worked as a machine operator and had operated the particular machine, or one like it, for some three years, during the last three months of which time and immediately preceding the injury complained of the machine as admitted by the miner was out of repair "in every way in the world. Every speck of it was out of repair;" and that during the three months he had taken it to the shop as often as 25 or 30 times, but the condition of the machine remained the same during the entire three months. The miner from the facts disclosed, was thoroughly aware of the danger and of the possibility of just such an accident as did in fact happen to him and that continuing in the service with the machine in such condition for such a length of time and without any assurance as to his safety in the use of the machine and without any promise on the part of the mine operator to repair or improve the machine, he assumed the risk incident to its use.

Stonega Coke & Coal Co. v. Bush (Kentucky), 197 Southwestern, 389, p. 390.

RISKS NOT ASSUMED.

EMPLOYEE CAN NOT WAIVE OR CONTRACT AGAINST VIOLATION OF STATUTE.

The Legislature of Virginia assumed that men will work in the mines of the State without the protection of lights on the cars as required by the statute; otherwise the statute would not have been

necessary. The precautions obviously necessary to safety the legislature placed out of the domain of waiver by the employee, or of contract, either express or implied, between the parties, and requires these precautions as a matter of public policy and under the sanction of a penalty inflicted for failure to provide them.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 371.

VIOLATION OF STATUTE BY OPERATOR.

An employee in a coal mine does not assume the risk of a known violation by the employer of a penal statute requiring a light on the front and on the rear of trips of cars in coal mines, provisions deemed by the legislature necessary for the safety of employees in mines.

Pocahontas Consol. Collieries Co. v. Johnson, 244 Federal, 368, p. 371.

MINER'S KNOWLEDGE OF DANGER—OPERATOR'S WANTON NEGLIGENCE.

A miner is not to be charged with the assumption of risk and his action for damages for injuries caused by a fall of rock from the roof defeated, although he knew of the dangerous condition of the roof, and that a prop was needed and that props had not been furnished, and continued to make conditions more dangerous by the work he was doing, where the evidence shows that the mine operator had knowledge of the dangerous condition of the roof and that he grossly, wantonly, and recklessly permitted the roof to remain in its defective condition and the plaintiff was proximately injured by reason of said gross and wanton negligence.

Clinton Min. Co. v. Bradford (Alabama), 76 Southern, 74, p. 76.

MINER WORKING UNDER SHIFT BOSS—ASSURANCE OF SAFETY.

It is the duty of a miner to do such work and in such manner as the operator's shift boss may direct; and where a miner is directed by a shift boss to bar down and make safe the place where he was working it is his duty to follow such directions and it is not a part of his duty to inspect the part of the stope above him that could not be seen by the aid of his miner's lamp and that could not be examined by any means provided. Under such circumstances the miner does not assume the danger from loose rock in the roof of the stope, and it is proper in an action by the miner for injuries received from a fall from the roof for him to testify that the shift boss told him that the ground or condition above him was all right.

Cnkovch v. Success Min. Co. (Idaho), 166 Pacific, 567, p. 570.

OPERATIONS OF EMPLOYER NOT IN VIEW OF EMPLOYEE.

A miner in his working place in a mine and while in the place assigned to him in which to work does not assume the risk of dangers from other operations of the employer that are not within his view and which are obstructed from his sight and of which he has no warning.

Clinchfield Coal Corp. v. Ray (Virginia), 93 Southeastern, 601, p. 604.

DANGEROUS ROOF—MINER REMOVING FALLEN SLATE.

A miner was employed simply to remove from a room slate that had fallen and it was the duty of the mine operator and not of the miner to make and maintain the roof at the place of the accident in a reasonably safe condition for the work the miner was then doing. It was the duty of the mine foreman to inspect the roof at least once each day so as to protect from injury the miner and others working thereunder; but on the particular occasion the foreman did not inspect the roof from the time he directed the miner to go to work there until after the accident. Under such circumstances the miner was under no duty to look out for the safety of the place where he was working and he did not assume the risks incident to such work.

Consolidated Coal Co. v. Spencer (Kentucky), 197 Southwestern, 1069, p. 1070.

RIGHT TO SURFACE REPORT.**MINING AND REMOVING PILLARS—RIGHT TO INJUNCTION.**

A surface owner is not entitled to an injunction to prevent a coal mine operator from mining out pillars where the subsidence of the surface was complete and the legal injury occurred more than three years prior to the filing of the complainant's bill. The fact that the mine operator intends to mine the lower veins of coal will not entitle the surface owner to an injunction where no injury to the surface is apprehended from that source.

Drake v. Berry (Pennsylvania), 102 Atlantic, 315, p. 317.

NUISANCE.**SMELTER OPERATIONS—INJURIES FROM POISONOUS GASES.**

A farmer brought an action against a smelting company for damages for injuries to crops, live stock, and for the death of certain animals. The injuries were alleged to have been caused by the operation of the smelter whereby smoke, fumes, and poisonous gases arising from the smelting of copper, iron, zinc, silver, arsenic, and antimony and other minerals were discharged into the air and carried over and upon the plaintiff's lands. The evidence showed the death of certain horses and cows, and the symptoms during the progress of the sickness and disease resulting in death were described by the witnesses, but the witnesses could only conjecture that the sickness and death of the animals were caused by the smelter fumes and gases. The testimony also showed that during the same period of time there was prevalent in the vicinity a disease designated as infectious pneumonia and the disease had many symptoms similar to those of the complainant's animals. The testimony also showed that an infallible test can be made to determine whether or not an animal died from mineral poisoning and that such test was made on some of the animals that died and

no mineral poisoning was discovered. The evidence was not sufficient to establish that the animals died from the smoke, fumes, and poisonous gases resulting from the smelting operations.

Sagers v. International Smelting Co. (Utah), 168 Pacific, 105, p. 109.

OVERFLOW OF ARTESIAN WELL.

The continued overflow of an artesian well and permitting the waters to run to waste in large quantities result in the water-logging of land and destroy its productiveness. In view of these facts and of the further fact that the water in artesian wells comes from the same basin and the continued overflow of a well is necessarily a waste of water derived from the common source of supply and diminishes the water supply available for legitimate uses and works an injury and a detriment to the general public, the legislature has the power to declare such continuous flow and waste of water to be a public nuisance and to make regulations preventing or abating the same.

Eccles v. Ditto (New Mexico), 167 Pacific, 726, p. 728.

MINING LEASES.

LEASES GENERALLY—CONSTRUCTION.

CONSTRUCTION AND TERMINATION.

The owner of oil lands executed a mortgage thereon to secure certain indebtedness and subsequently executed a lease for the development of the land for oil. The foreclosure of the mortgage and a sale on the decree of foreclosure put an end to the leasehold interest.

Mercantile Trust Co. v. Sunset Road Oil Co. (California), 168 Pacific, 1037.

CONSTRUCTION—FORFEITURE—ACCEPTANCE OF RENT.

The acceptance of rent after covenants broken may estop a landlord from claiming forfeiture of the lease or reclaiming possession.

East Sioux Falls Quarry Co. v. Wisconsin Granite Co. (South Dakota), 164 Northwestern, 77.

CONSTRUCTION—ROYALTIES AS RENTALS.

A lease of a mine by which the owner or lessor grants to the lessee the privilege of mining and operating the same in consideration of the payment of a certain stipulated royalty on the ore taken out creates the relation of landlord and tenant and when that relation is created whatever is paid for the occupation and use of the premises, whether it be in money or kind, is equally in substance rent, and under such circumstances the royalties received are rentals and subject to taxation as such.

Phister Land Co. v. City of Milwaukee (Wisconsin), 165 Northwestern, 23, p. 25.
Von Baumbach v. Sargent Land Co., 242 U. S., 503.

HUSBAND AND WIFE—RIGHT TO ROYALTY.

A husband held the legal title to an one-fourth interest in a mining claim in trust for his wife who was the equitable owner thereof. The owner of the three-fourths interest leased such interest to the husband on condition that the husband was to operate the entire claim and pay the three-fourths lessor 25 per cent of the total output. Subsequently and before mining operations began the husband on a consideration conveyed the one-fourth interest to his wife and at the same time executed a sublease to a third person by which such third person was to pay him 5 per cent of the gross output in addition to the 25 per cent to be paid to the owner of the three-fourths interest, to which sublease the wife consented. The wife as

against the claims of the trustee of the bankrupt husband is entitled to the 5 per cent of the proceeds of the sublease, as the conveyance by the husband to the wife carried with it in legal effect the sublease executed by the husband.

Patterson v. Stroecker, 245 Federal, 732, p. 734.

PAROL AGREEMENT TO PURCHASE LEASE—STATUTE OF FRAUDS.

The complainant was negotiating with the owner of mineral lands for a lease of such lands for a period of 10 years. Pending the negotiations and before the execution of the lease he entered into a contract with the defendants by which he was to sell and the defendants were to purchase the lease at the agreed price of \$5,000. The defendant at the time this agreement was entered into was carrying on mining operations on other lands of the landowner adjoining the lands proposed to be leased, and pursuant to such oral agreement the defendant began mining operations on the lands proposed to be leased to the complainant and under the verbal arrangement to purchase such lease and mined and removed more than \$30,000 worth of ore. The complainant instituted his action to recover of the defendant the \$5,000 agreed to be paid for the lease. A recovery was denied on the ground that the parol contract for the sale of the lease was within the statute of frauds. Thereupon the complainant instituted an action against the defendant to recover damages for use and occupation of the premises. As the parol contract for the purchase of the lease was void under the statute of frauds it could not create the relation of landlord and tenant and could not furnish a foundation for an action for use and occupation on the implied promise to pay and as the relation of landlord and tenant did not and could not exist by reason of such parol agreement, the complainant could not recover on the theory of a liability for use and occupation.

Wilson v. McInturff (Missouri Appeal), 198 Southwestern, 421.

See *Aylor v. McInturff*, 184 Missouri Appeal, 691, 171 Southwestern, 606.

LEASE OF INDIAN LANDS—APPROVAL BY COURT.

A mining lease of Indian lands was required by the order of the court to be submitted to and approved by the Secretary of the Interior. The fact that the court ordering the lease approved it does not annul the order requiring it to be approved by the Secretary where the terms of the lease itself and every condition of the lease make it manifest that it was drawn with reference to the power of the Secretary to approve or disapprove it and that its execution was subject to all the conditions, limitations, and restrictions resulting from such situation.

Wellsville Oil Co., v. Miller, 243 U. S., 6, p. 13.

COAL LEASES.

CONSTRUCTION—SEPARATE PROVISIONS CONSTRUED TOGETHER.

A coal-mining lease provided that if the lessee should cease operations for a period of three months it should work a forfeiture of the lease unless the delay was unavoidable. Another section of the lease provided that any failure on the part of the lessee to perform the conditions and covenants of the lease to be by him performed, that should continue for a period of 30 days, shall be deemed, at the option of the lessor, ipso facto, to work a forfeiture of the lease. This second provision does not give the lessee an additional 30 days before the forfeiture provided for in the first clause should become effective. The latter provision was a general forfeiture clause, while the former was a specific provision covering a particular situation not embraced within the terms of the general forfeiture clause. The lease must be interpreted as a whole and in such way as to give effect to all of its provisions, and the failure for three months to operate the mines could not be extended 30 days by the later provision.

Matoaka Coal Corp. v. Clinch Valley Min. Co. (Virginia), 93 Southeastern, 799, p. 803.

LEASE CONSTRUED IN CONNECTION WITH WILL.

A mining company was mining and operating certain tracts of land under a lease executed by the trustee of an insane person who was the owner of an interest in the land and coal. The coal company also owned an interest in the land. The rights of the parties depended upon the will of the deceased ancestor of such insane person as well as the lease under which the coal company was operating. The trustee of the insane part owner sought by a bill in equity to have an accounting and to enjoin the further removal of coal by the coal company. A court could not grant the relief demanded where a copy of the will was not filed with or as a part of the plaintiff's bill, inasmuch as the court could not accept the plaintiff's construction of the will upon which he based his right to the relief demanded.

Wilmer v. Philadelphia-Reading Coal & Iron Co. (Maryland), 101 Atlantic, 538, p. 540.

CONSTRUCTION—MINER'S WEIGHT.

The term "miner's weight" used in a coal-mining lease as the basis for the price per ton to be paid for mining, is not a fixed, unvarying quantity of mine-run material, but is such quantity of material as operators and miners may, from time to time, agree as being necessary or sufficient to produce a ton of prepared coal. The term used in a coal-mining lease executed in 1863 was manifestly adopted by the lessor and lessee as meaning the ton-weight of material required to be mined as equivalent to a ton of prepared coal. The

term must be held to mean a miner's weight ton as fixed and agreed upon by the operator and miner during an accounting period and not the amount understood at the time of the execution of a lease.

Drake v. Berry (Pennsylvania), 102 Atlantic, 315, p. 320.

"MINER'S WEIGHT"—MEANING.

A coal-mining lease gave the lessee the right to mine and carry away 5,000 tons of coal yearly at 10 cents a ton "miner's weight to be the standard." "Miner's weight" is not a fixed unvarying quantity of mine-run material that a miner must produce in order to be paid for mining a ton of coal, the excess being a more or less arbitrary advance against him for refuse and waste in the mine-car content. The failure of a lease to state the number of pounds as a miner's weight would indicate that the amount of the mine-run material which a miner must produce would vary from time to time with the changes in the quality of the material obtained from the mine.

Drake v. Berry (Pennsylvania), 102 Atlantic, 315, p. 320.

VALIDITY OF LEASE—DETERMINATION—JURISDICTION OF COURT.

A lease was executed by tenants in common in the State of Maryland granting the right to operate and mine coal lands and coal mines in the State of Pennsylvania. One of such tenants was an insane person and the court authorized his committee to execute the lease for him. The insane ward had also a trustee who managed his estate. At the time of the execution of the lease the same person was the committee and the trustee for the insane ward. The validity of a lease so signed and its effect upon the title of the coal in the State of Pennsylvania must be determined under the laws and by the courts of that State. The courts of Maryland in an action involving the title to the property in Pennsylvania can not properly determine the question of the title and the rights of the parties under such a lease and do justice to the parties.

Wilmer v. Philadelphia-Reading Coal & Iron Co. (Maryland), 101 Atlantic, 538, p. 542.

PERFORMANCE—UNAVOIDABLE DELAY—EXCUSE.

A coal lease provided that if the lessee ceased for a period of three months to operate the leased mine the lease should be forfeited unless the delay was unavoidable and caused by circumstances beyond the control of the lessee. The lessee did cease to operate the leased mine for a period of more than three months but claimed that the cessation of operations were due to circumstances beyond his control in this, that there was a general strike at the mines, and a mountain slide which covered the tracks over which the coal had to be shipped. The proof showed that the lessee corporation was practically bank-

rupt, its plant in poor condition, its miners restless and uneasy, and few of them at work when the lessee ceased his operations. The slide was of trifling consequences and proved to be a slight obstruction and finally was removed in a few days. "Upon no reasonable view of the case could it be held that there was ever a strike or a slide of such character as to excuse the lessee from the operation of the mines according to the contract."

Matoaka Coal Corp. v. Clinch Valley Min. Co. (Virginia), 93 Southeastern, 799, p. 803.

BREACH OF COVENANT—MAINTENANCE OF COAL PILLARS.

A coal mining lease provided that between the outer boundary lines of the leased premises and the adjacent property there shall be left a solid wall of coal at least 60 feet in thickness that shall not in any manner be broken through without the written consent of the lessor. A third person can not maintain an action for a breach of this covenant in the lease where as complainant he does not show that he was a party to or had any interest in the particular covenant in the lease. The plaintiff could not recover on the ground of an implied covenant for quiet enjoyment where he made no statement of any such claim in his pleading.

Dodson Coal Co. v. Delano (Pennsylvania), 102 Atlantic 126.

COVENANT TO LEAVE PILLARS—MINING WITH CONSENT OF LESSOR.

An adjoining landowner can not complain of a breach of a covenant by a lessee to leave certain pillars in a coal mine, where the condition was that the lessee should not remove or drill through the pillar without the consent of the lessor, and where the lessor gave his consent to the lessee to so mine through the pillar.

Dodson Coal Co. v. Delano (Pennsylvania), 102 Atlantic, 126, p. 127.

EXECUTION BY TRUSTEE OF INSANE PERSON.

A court authorized the committee of an insane person to join with other tenants in common in the execution of a lease of coal mines on the premises. The lease was improperly executed by a trustee under the will through which the tenants in common derived title to the coal. The trustee of such insane person can not after receiving and accepting his ward's full share under the lease and after a long lapse of time, sue and require an accounting and payment for his ward's interest in the coal mined and sold. Under such circumstances the court having jurisdiction of the ward's estate may ratify the unauthorized execution of the lease and do justice to all the parties by denying the trustee the right to recover.

Wilmer v. Philadelphia-Reading Coal & Iron Co. (Maryland), 101 Atlantic, 538, p. 542.

FAILURE OF ONE COTENANT TO JOIN IN LEASE—ACCEPTANCE OF RENTAL—ESTOPPEL.

A number of tenants in common joined in a coal mining lease to another cotenant, who under the lease mined and removed the coal and accounted therefor to his cotenants. One cotenant, who did not join in the lease but who received and accepted and retained his full aliquot part of the rentals, can not afterwards sue and recover the value of his undivided interest on the ground that he did not unite in the lease.

Wilmer v. Philadelphia-Reading Coal & Iron Co. (Maryland), 101 Atlantic, 538, p. 541.

EJECTMENT—DISTRESS NOT REQUIRED.

The Code of Virginia (sec. 2796) requires in actions of ejectment based upon a right of reentry for nonpayment of rents, proof of distress upon the property. But where the amount of the rent due exceeds the value of the personal property of the lessee on the premises the distress is not required.

Matoaka Coal Corp. v. Clinch Valley Min. Co. (Virginia), 93 Southeastern, 799, p. 804.

EJECTMENT—SUBLESSEE FROM LESSEE IN POSSESSION.

In an action of ejectment by a lessor against the assignee of the lessee because of a forfeiture of the lease by reason of the violation of its covenant, a sublessee is a proper but not a necessary party to the action within the meaning of the Virginia Code; but under the provisions of the code he may be named as a party (Virginia Code, sec. 2726). Such a person is a proper party where he is the only party in interest, and where he refused to disclaim in the absence of the original lessee. The failure of the lessor to make the original lessee a party was not a bar to an action even in tort and could only be pleaded in abatement.

Matoaka Coal Corp. v. Clinch Valley Min. Co. (Virginia), 93 Southeastern, 799, p. 805.

FORFEITURE—UNAVOIDABLE DELAY.

The fact that a lessee did not have sufficient funds with which to operate a leased coal mine could not be considered a delay that was unavoidable or caused by circumstances beyond its control, and was not sufficient to prevent a forfeiture under the terms of the lease.

Matoaka Coal Corp. v. Clinch Valley Min. Co. (Virginia), 93 Southeastern, 799, p. 803.

OIL AND GAS LEASES.

CONSTRUCTION—CONDITION OF FORFEITURE.

An oil and gas lease must state the condition upon which a forfeiture can be declared or no forfeiture can be declared.

Smith v. Peoples Natural Gas Co. (Pennsylvania), 101 Atlantic, 739, p. 741.

CONSTRUCTION—TENANT IN COMMON—ROYALTIES.

An oil and gas lease provided for the payment of one-eighth of the oil produced as royalty and required the lessee to carry the lessor's one-sixteenth working interest clear through on the lease. These provisions mean that the lessee shall conduct the operations upon the land without calling on the lessor to contribute to the funds necessary to produce the oil and shall pay to the lessor, in addition to the royalty, one-sixteenth of any profits derived from such operations, as though he was actually a partner.

Paxton v. Benedum-Trees Oil Co. (West Virginia), 94 Southeastern, 472, p. 476.

CONSTRUCTION—PAYMENT OF RENTALS—RIGHT TO FORFEIT.

An oil and gas lease granted to the lessee all the oil and gas in and under the land described. The lessee agreed to drill a well on the premises within four months or thereafter pay to the lessor a stipulated sum quarterly in advance until a well should be drilled or the property surrendered. The lease also provided that if oil was found in paying quantities the lessee was to deliver to the lessor one-sixth of the oil produced, and if gas was found in paying quantities he should pay the lessor at the annual rate of \$200, payable in advance. By the terms of the lease the lessee could at any time remove all of his property, fixtures, etc., and surrender the lease and terminate his liability thereunder. The lessee subsequently assigned his lease to a natural-gas company. No well had been drilled for a period of 10 years, but the lessee and his assignee had paid the stipulated rental sum. In August, 1912, the lessor refused to receive further rentals and demanded a surrender of the lease. The rental for each quarter thereafter was tendered until June, 1913, and the rental due on June 4 of that year was not tendered until June 16, and was declined. In December following the lessor notified the lessee that he declared the lease forfeited for the reason that the rental due June 4, 1913, was not paid. In May, 1915, the lessor began his action to have the lease declared forfeited. The acceptance of the quarterly payments, treated by both parties as rentals, negatived any claim that the contract had either expired or had been rescinded, and up to that time the relation of landlord and tenant existed. The refusal to accept the tender of September, 1912, was on the ground that it was not made in time, an admission that up to that date the contract was a subsisting one and had neither been rescinded nor revoked. As the lease made no provision for forfeiture, under the facts stated the lessor was not in a position to demand and enforce a forfeiture of the lease.

Smith v. Peoples Natural Gas Co. (Pennsylvania), 101 Atlantic, 739, p. 740.

CONSTRUCTION—RIGHTS OF LESSEE AS AGAINST SURFACE OWNER.

The lessee of an oil and gas lease has the right as against a grantee of the surface to enter upon the surface of the land and explore and operate the same for oil and gas, where the common owner of the surface and minerals sold and conveyed the surface, reserving to himself all mineral rights and the right to enter upon the land and to use so much of the surface as may be reasonable for the purpose of extracting the mineral therefrom.

Barker v. Campbell-Ratliffe Land Co. (Oklahoma), 167 Pacific, 468.

PRACTICAL CONSTRUCTION.

Where the terms of an oil and gas lease are clear and explicit, and the meaning is not doubtful, and there is no latent ambiguity, the lease can not be varied by the subsequent conduct of the parties or surrounding circumstances. The parties must be deemed to be bound by the lease, regardless of the results produced.

Jameson v. Chanslor-Canfield Midway Oil Co. (California), 167 Pacific, 369, p. 372.

CONSTRUCTION—"PAYING QUANTITIES."

An oil and gas lease was for a term of five years and as long thereafter as oil or gas was produced therefrom in paying quantities. The production required to effectuate the extension provided for, in the absence of equitable circumstances varying the rule, is that quantity which will bring a reasonable pecuniary return in excess of the cost of production, regardless of any particular amount of profit derivable from the operation of the well.

Barbour, Stedman & Co. v. Tomkins (West Virginia), 93 Southeastern, 1038, p. 1040.

COMPROMISE AGREEMENT—CONSTRUCTION.

A landowner executed an oil lease to certain-named lessees. No development work was done under the lease. Subsequently the landowner executed another lease to other lessees, who immediately began development work, and after they discovered oil the senior lessees began suit for possession of the land and an accounting. Pending suit a compromise was effected and a compromise agreement entered into. In a subsequent action by the senior lessees to recover sums paid the junior lessees for oil prior to the execution of the compromise agreement, the terms of the compromise agreement construed in the light of the situation of the parties at the time it was entered into was sufficient to excuse the junior lessees from liability for payments made them for oil prior to the execution of the agreement.

Guffey v. Smith, 245 Federal, 106, p. 109.

EXECUTION—SIGNING BY LESSEE UNNECESSARY.

The signing of an oil and gas lease by the lessee is not necessary in order to give him the right to sue for a breach of the covenant where there is nothing to show that such signing was contemplated by the parties.

Allan v. Guaranty Oil Co. (California), 168 Pacific, 884, p. 887.

RIGHTS OF SECOND LESSEE—NOTICE.

An owner of land executed an oil and gas lease thereon and afterwards executed certain extensions of such lease and subsequently executed to a third person an oil and gas lease upon the same land. Such lease named last can not prevail against the former lease and its extensions, unless the lessee of such second lease had no knowledge of the former lease and its extensions or had no such knowledge as would put him upon inquiry and which if followed up would have disclosed the existence of such lease and its extensions.

Swan v. O'Bar (Oklahoma), 167 Pacific, 470, p. 472.

GRANT OF ONE-HALF OF ROYALTIES—LEGAL EFFECT.

An oil and gas lease or conveyance making a grant or reservation of one-half of the royalties, rents, and income from the oil is a grant of one-half of the oil in place.

Paxton v. Benedum-Trees Oil Co. (West Virginia), 94 Southeastern, 472, p. 475.

Overruling *Harris v. Cobb*, 49 West Virginia, 360, 38 Southeastern, 559.

ROYALTIES—RIGHTS OF TENANTS IN COMMON.

Where one tenant in common takes possession of the joint premises to the exclusion of his cotenant and leases the same to a third party for the purpose of abstracting the oil therefrom conditioned for a specific proportion of the oil to be paid as royalty, the tenant excluded may if he so elect permit the lessee to continue operations under the lease and require him to account for such proportion of the royalties as his interest in the oil in place bears to the whole thereof.

Paxton v. Benedum-Trees Oil Co. (West Virginia), 94 Southeastern, 472, p. 474.

RECEIPT OF OIL ROYALTIES—RIGHT TO GAS RENTALS.

The fact that a lessor of an oil and gas lease received payments of the oil royalties will not prevent him from recovering the gas rentals stipulated in the lease where the well, in addition to producing oil, produced from one to one and a half million cubic feet of gas per day and where by reason of the gas being found in sand above the oil it could have been utilized by the lessee.

Prichard v. Freeland Oil Co. (West Virginia), 93 Southeastern, 871.

WELL PRODUCING OIL AND GAS—RENTALS.

An oil and gas lease reserved as royalty one-eighth of all the oil produced and provided also for the payment of a stipulated sum for each gas well drilled on the premises, payments to be made on each well within 60 days after a well is completed and to be paid yearly thereafter while gas is produced. The right of the lessor to the gas rental does not depend on whether the particular lessee or some operator can market the gas or whether the same is or can not be marketed by him off the premises, but whether the well is a gas well within the proper meaning and intention of the lease. If a well should be productive in both oil and gas in paying quantities, the terms of the lease would reasonably call for payment of the rent for both products.

Prichard v. Freeland Oil Co. (West Virginia), 93 Southeastern, 871.

PURPOSE OF LEASE—DUTY OF LESSEE TO DEVELOP.

All leases of land for the exploration and development of oil and gas are executed by the lessor in the hope and upon the condition, express or implied, that the land will be developed and thoroughly tested. It would be unjust and unreasonable, as well as contrary to the nature and spirit of such a lease, to allow the lessee to continue to hold the leased premises any considerable length of time without making any effort to further develop the land according to the express or implied purpose of the lease.

Dinsmore v. Combs (Kentucky), 198 Southwestern, 58, p. 60.

DUTY TO DEVELOP—PROTECTION FROM DRAINAGE.

The number and location of wells requisite to the performance of a covenant to drill under an oil and gas lease depend upon the character of the leased territory and whether after the discovery of oil or gas there is a duty to sink an additional well or wells depends upon the probabilities arising from the circumstances surrounding the property and whether they will be profitable to the lessee. The lessee is under no duty to operate a lease at loss to himself to make the premises profitable to the lessor. The lessee must bear all the burdens incident to development and if a well is dry he loses its cost; but if it proves rich in either mineral the lessor receives his share but loses nothing in any event. For such reasons the lessee, except where he fraudulently fails or refuses to act when affirmative action is required, must control the prosecution of the necessary operations, but he can not unduly delay operations where clearly the conditions surrounding the property are such as require speedy progress to effect development and to afford protection against drainage.

Jennings v. Southern Carbon Co. (West Virginia), 94 Southeastern, 363, p. 364.

Chambers v. Perrine (West Virginia), 94 Southeastern, 381.

NUMBER OF WELLS NOT SPECIFIED—IMPLIED OBLIGATION TO DRILL
WELLS.

An oil and gas lease provided that the lessee should deliver to the lessor one-eighth of all the oil produced from the leased premises. The lessee was bound to commence operations on the leased land, or on adjoining lands, and push the work with due diligence until a well should be completed, and if the first well drilled should not prove to be a good or producing well the lessee was to surrender the lease or proceed within 60 days thereafter to drill other wells on the leased premises, and if the lessee ceased to drill or operate on the leased premises he should remove the drilling machinery therefrom and the lease should be surrendered. Two wells were drilled by the lessee, one of which was soon exhausted and the other continued to produce a small quantity of oil; producing wells were drilled on adjoining lands, but no other wells were drilled on the leased premises for seven or eight years. Under such a lease where the number of wells to be drilled is not specified there is an implied obligation that the lessee will fully develop the land by sinking a sufficient number of wells to secure to the lessor a reasonable royalty. When oil or gas is found on leased premises in paying quantities, the lessee is bound to diligently work and operate it so as to bring the product to a present market, and thus to promptly yield to the lessor his royalty, and unless the lessee does actually develop the leased land and in good faith diligently operates under the lease he will be deemed to have abandoned the lease and it will be canceled.

Dinsmore v. Combs (Kentucky), 198 Southwestern, 58, p. 60.

ACTION FOR BREACH OF COVENANT—PLEADING.

In an action by the lessee against the lessor in an oil and gas lease for breach of a covenant for possession and quiet enjoyment, the breach of the covenant is sufficiently alleged by an averment that the title and right to possession were not in the defendant but in a third person and that such third person had brought suit against the lessor and lessee to quiet title to the premises and that the lessor had never, in fact, delivered the possession of the premises to the lessee. The complainant under such circumstances is not required to allege that the defendant, the lessor, had failed to protect him according to the covenant where he took upon himself the burden of proving that the defendant had no rights in the property.

Allan v. Guaranty Oil Co. (California), 168 Pacific, 884, p. 883.

BREACH OF COVENANT—FAILURE OF LESSEE TO PERFORM—PLEADING.

An oil and gas lease gave the lessee three months within which to commence operations; but within seven days after the execution of the lease a third person began suit against the lessor and the lessee to

quiet title against both. In a subsequent action by the lessee against the lessor for damages for breach of the covenant for possession and enjoyment the complainant, by alleging that the suit to quiet title was so begun within seven days after the execution of the lease, stated a cause of action without averring performance on his part.

Allan v. Guaranty Oil Co. (California), 168 Pacific, 884, p. 887.

SUFFICIENCY OF COVENANT FOR POSSESSION.

No particular words need be used in an oil and gas lease in order to constitute a covenant for possession and quiet enjoyment, but the intention of the parties will control. A provision in an oil and gas lease to the effect "that the first party agrees to protect second party against the claims of any party or parties, should any contests ever arise as to the ownership of same," is sufficient, considering the nature of the instrument and the activities to be engaged in thereunder, to show that the lessee should not be disturbed in his possession or use of the land in question.

Allan v. Guaranty Oil Co. (California), 168 Pacific, 884, p. 888.

BREACH OF COVENANT TO DRILL—DELAY RENTALS.

When an oil and gas lease contains no express covenant, an implied covenant to drill and protect the lines are alone relied on, and the declaration is silent as to whether the delay rentals have been paid, the declaration is insufficient in an action at law. When such a lease for a specified term imposed the alternative duty to drill or pay delay rental, there is no implied covenant for diligent operation merely to make the lease profitable to the lessor, the delay rentals being regarded as sufficient consideration for postponement of such operations.

Chambers v. Perrine (West Virginia), 94 Southeastern, 381, p. 383.

NO IMPLIED COVENANT TO DRILL OFFSET WELLS—DEMAND AND NOTICE NECESSARY.

In the absence of express covenant in an oil and gas lease to drill there is no implied covenant operative within the period of postponement to drill offset wells to prevent drainage through wells on adjoining territory; but there is an implied condition that in the event of such drainage or imminent danger thereof the lessee will, upon demand of the lessor, drill a well on the leased premises for such purpose within the last period for which the delay rental has been or shall be accepted, or commence one within such period and diligently prosecute the work on it, where such demand is accompanied by a notice of the intention to refuse to receive further payments of rentals and to declare a forfeiture of the lease for failure to drill the well on demand.

Chambers v. Perrine (West Virginia), 94 Southeastern, 381, p. 383.

BREACH OF COVENANT FOR POSSESSION—BURDEN OF PROOF.

In an action by the lessee of an oil and gas lease against the lessor for breach of covenant for quiet enjoyment, the plaintiff, the lessee, by yielding to the paramount title of a third person without a prior demand upon the lessor undertook the burden of proving the validity of such paramount title.

Allan v. Guaranty Oil Co. (California), 168 Pacific, 884, p. 887.

BREACH OF COVENANT FOR POSSESSION—EVICTION—PLEADING.

In an action by the lessee against the lessor of an oil lease for damages for breach of covenant for quiet enjoyment and for failure to deliver possession of the premises to the lessee, the lessee is not required to aver an eviction where he had never in fact had possession of the premises. But an averment that a third person had asserted and maintained a paramount title and the right to possession in a suit by him to quiet the title against the defendant and complainant is the equivalent of an eviction.

Allan v. Guaranty Oil Co. (California), 168 Pacific, 884, p. 887.

BREACH OF COVENANT FOR POSSESSION—EVICTION—NOTICE OF SUIT.

The real owner of land brought suit against a lessor in an oil and gas lease, who claimed some interest in and a right to lease the premises, and against his lessee, to quiet the title as against the claims of both. A decree for the plaintiff was rendered. In order to constitute such suit the equivalent of an eviction, notice by the lessee to the lessor of the pending suit and a demand to defend the same was not necessary, nor was it necessary that the paramount title should have been established by judgment.

Allan v. Guaranty Oil Co. (California), 168 Pacific, 884, p. 887.

FAILURE TO DELIVER POSSESSION—DEMAND UNNECESSARY.

An oil and gas lease contained a provision by which the lessor agreed to protect the lessee against the claims of any person if any contest should arise as to the ownership of the premises. In an action for damages for the failure of the lessor to deliver the possession of the premises to the lessee and to recover the consideration paid, a demand upon the lessor for possession before suit was unnecessary, where it had been previously established that the lessor was never the owner or entitled to the possession of the leased premises, as a demand under such circumstances would be futile after a paramount title had been asserted by the real owner.

Allan v. Guaranty Oil Co. (California), 168 Pacific, 884, p. 887.

DAMAGES FOR FAILURE TO DELIVER POSSESSION—PLEADING—
ESTOPPEL.

In an action by the lessee of an oil and gas lease against the lessor for damages for failure to deliver possession of the leased premises and to recover the consideration paid because of such failure, and where it is averred that the lessor never delivered and never was able to deliver the possession of the leased lands to the complainant and that the complainant has never had possession of any of said lands, the defendant, the lessor, can not object to the insufficiency of the complaint on the ground that it does not aver performance on the part of the lessee, where the ultimate fact that the defendant had prevented the complainant from performing the conditions of the lease could be plainly inferred from the pleading.

Allan v. Guaranty Oil Co. (California), 168 Pacific, 884, p. 886.

BREACH OF COVENANTS—RIGHT TO FORFEIT.

Certain oil and gas leases contained the usual provisions for drilling oil wells and operating the premises for oil and gas for a stated period. The leases also provided that a failure upon the part of the lessee to perform any of the conditions for a period of 30 days after notification "by the parties of the first part" would be a ground of forfeiture. The leases were executed by three lessors, owners as tenants in common of the leased lands. Under these leases the event which may cause the forfeiture is the failure of the lessee to perform any of the conditions embodied in the leases for a period of 30 days after notification. By the express language of the forfeiture clause the notification must be given "by the parties of the first part." It is only upon the giving of this notice and the failure to perform the conditions named that a forfeiture can be declared. The event can not be said to have happened upon notification given by some of the parties of the first part or any number of them less than all. The provision is that even after the notification by all the parties a forfeiture may be brought about only "if said first parties shall so elect." The contract measures the rights of the parties in respect to the notification, and being a contract regarding a forfeiture it is to be strictly construed and its requirements must be fully met before the right depending thereon can be complete. The court is not dealing with rights and remedies secured to the lessors by force of law, but with rights which they secured to themselves by the provisions of their contract. They attempted to lay the foundation for a forfeiture by proceeding under their contract which required the joint action of all the lessors to accomplish that result, and the contract does not permit it to be done by less than all of the lessors. A forfeiture of the leases can not be demanded and enforced by a part only of the lessors.

Jameson v. Chanslor-Canfield Midway Oil Co. (California), 167 Pacific, 369, p. 371.

RIGHT TO FORFEITURE AND RELIEF FROM FORFEITURE.

The courts of Pennsylvania recognize a distinction between a proceeding for the enforcement of a forfeiture of an oil and gas lease and one asking for relief from forfeiture.

Smith v. Peoples Natural Gas Co. (Pennsylvania), 101 Atlantic, 739, p. 741.

FORFEITURE —FAILURE TO DRILL WELLS.

Equity will not ordinarily entertain jurisdiction to enforce a forfeiture for breach of conditions subsequent or of implied covenants in an oil and gas lease to drill wells or to protect the leased premises from drainage.

Chambers v. Perrine (West Virginia), 94 Southeastern, 381, p. 383.

FORFEITURE FOR FAILURE TO DEVELOP —NOTICE REQUIRED.

An oil and gas lease required the lessee to commence operations on the leased land and push the work with due diligence until a well should be completed, and if the first well should not produce oil in paying quantities the lessee should proceed within 60 days to drill other wells, and if he ceased to drill or operate the leased premises or remove his drilling machinery the lease should be surrendered as void. The lessee drilled two wells on the leased premises, one of which produced oil in small quantities and the well was operated for a period of seven or eight years, the lessor receiving and accepting during all of such period the royalties provided for in the lease; but no other wells were drilled on the premises within that period. Forfeiture for nondevelopment or delay is essential to private and public interest in relation to the use and alienation of property, and in no other business is prompt performance of contracts so essential to the rights of the parties, or delay by one party to prove so injurious to the other, as in the matter of oil and gas leases. But an oil lease under the circumstances here shown should be so construed as to effectuate the intention of the parties in the manner that will do justice to the lessor as well as the lessee without arbitrarily canceling it. The lessor in this lease did not at any time during the seven or eight years demand or exact of the lessee that he commence operating for oil or gas, but accepted the annual rentals paid in full discharge of the obligations of the lease. The lessor at the end of any rental period might have declined to accept royalties and required the lessee to further develop the premises. Under such conditions the lessor is required to give notice to the lessee that he will not accept further royalties and permit the land to remain idle and undeveloped, but will require the lessee to execute the lease according to its terms, and if the lessee then refuses in good faith to commence further drilling, the lessor may by an appropriate action forfeit the lease.

Dinsmore v. Comb (Kentucky), 198 Southwestern, 58, p. 60.

GAS IN PAYING QUANTITIES—RIGHT OF GRANTOR TO FORFEIT LEASE.

The lessor of an oil and gas lease giving the right to explore his land for oil and gas can not forfeit the lease merely because he thinks the quantity of gas discovered is not sufficient to constitute a paying well, where the lessee claims it is such a well and is willing to pay the stipulated rent. It is for the lessee to say when acting in good faith whether the gas is produced in paying quantities.

Barbour, Stedman & Co. v. Tompkins (West Virginia), 93 Southeastern, 1038, p. 1040.

JOINT LEASES—JOINT RIGHT—POWER TO FORFEIT.

Certain oil and gas leases contained a covenant whereby the lessee agreed to drill wells for oil and gas upon the leased lands, do the annual assessment work, and take the steps necessary to acquire patent to the lessors for the lands from the United States, operate pumps to obtain the oil and gas and to pay the lessors a stipulated royalty. The lessee was to have full possession of the lands for the purpose of operating the leases. The leases provided that upon failure of the lessee to perform any of the conditions named for a period of 30 days after notification by the lessors to perform such conditions, the leases shall be null and void, if the lessors shall so elect. The leases were executed by three persons as lessors and one was executed by an oil company, the entire capital stock of which was owned by the other lessors. On September 25, 1911, two of the lessors served on the lessee a notice referring to the conditions of forfeiture and to the implied covenants of the leases, requiring the lessee within 30 days to perform the conditions embodied in each of the leases, stating the particulars thereof and that the failure to perform would render the leases null and void. Thereafter on December 6, 1911, the two lessors by written notice to the lessee declared that because of his failure to perform the conditions in the leases as required by the former notice, they did thereby elect to declare said leases null and void and to terminate the same and demanded an immediate surrender of the possession of the property. On failure of the lessee to surrender the property an action was begun by the two lessors named to quiet the title to the premises. The Civil Code of California provides that a right created in favor of several persons is presumed to be joint and this presumption can be overcome only by express words to the contrary. The provision for forfeiture of the leases is a right created in favor of the lessors within the meaning of the civil code and is not a right reserved to them without application of the code provision. There are no words in the provision, express or otherwise, declaring it to be a several right. The intention of the provision was to enable the lessors to procure and extract a faithful performance of the provisions of the leases and on failure so to do to retake the property and there-

fore it was for the benefit of the lessors and is to be strictly interpreted against them. On this theory it was not within the power of the two lessors to declare a forfeiture of the leases and such forfeiture could be declared only by the joint or concurrent act of all the lessors.

Jameson v. Chauslor-Canfield Midway Oil Co. (California), 167 Pacific, 369, p. 370.

LEASE OF INDIAN LANDS—VALIDITY.

By the act of June 7, 1897 (30 Stat., 62, p. 72), the Quapaw Indians were authorized to lease certain lands for a term not exceeding 10 years for mining purposes. An Indian allottee, subject to this statute, leased his land for the purpose of prospecting, mining, drilling, boring or digging for oil, gas, asphaltum, lead, zinc, coal, and copper and all and every kind of valuable minerals for 10 years, with an additional provision that if oil, minerals or any other substances of value were found in paying quantities the privilege of operating should continue so long as oil, minerals or other substances could be produced in paying quantities. The rule of law is that when conveyances or contracts contain conditions some of which are legal and others illegal and they are several and separable as respect consideration and performance, the latter may be disregarded and the former enforced. Under this rule, the lease in question was held to be divisible and the invalidity of the provision for an extension of time for operation can not affect its validity for the 10-year term which was within the statute and valid.

McCullough v. Smith, 243 Federal, 823, p. 829.

INDIAN LEASE—APPROVAL BY COURT AND SECRETARY.

The fact that an oil lease for Indian land was reported to and approved by the court that ordered the lease did not retract the condition precedent established by the order of the court to the effect that the lease must be presented and approved by the Secretary of the Interior; as the report of the lease and its approval were mere prerequisites and preliminary steps to the submission of the lease to the Secretary of the Interior for his action as required by the original order.

Wellsville Oil Co. v. Miller, 243 U. S., 6, p. 13.

INDIAN LANDS—LEASE—APPROVAL BY SECRETARY.

Section 1 of the act of May 27, 1908 (35 Stats., 312), provides that the Secretary of the Interior may remove the restriction on alienation of Indian allottees wholly or in part under such rules and regulations as to the terms of sale and the disposal of the proceeds as he may prescribe. Section 2 provides that leases of restrictive lands for oil, gas, or mining purposes approved by the Secretary of the Interior by rules and regulations approved by him shall be valid. Such leases of lands valuable for their oil, gas, or mineral, result

in the extraction and disposition of the most valuable part of the property and necessarily remove from that part of the property all restrictions upon alienation and if they fail to do so, they would be ineffective and void. When such leases are approved under section 2, they necessarily remove the restriction from the property in part under rules and regulations approved by the Secretary and if restrictions were removed to the same extent under section 1, they would likewise be removed under the rules and regulations approved by the Secretary. It was neither the intent of Congress, nor is it the effect of the provision in section 9, relating to homesteads, to invalidate leases approved by the Secretary under section 2, or to deprive them of the indispensable effect of valid leases, the removal of the restriction on alienation on leaseholds they evidenced and the royalties they provided. As restrictions on alienation may be removed from leaseholds and their royalties either under section 1 or under section 2, it is essential to the validity of the removal under either section that the same or a like removal should have been first sought and procured under the other.

Parker v. Riley, 243 Federal, 42, p. 45.

INDIAN LANDS—RESTRICTION ON ALIENATION—REMOVAL BY SECRETARY.

An act of May 27, 1908 (35 Stats., 312, p. 315), provides that homesteads of allottees enrolled as mixed-blood Indians having half or more than half Indian blood, and all allotted lands of enrolled full-blooded and enrolled mixed-blood of three-quarters or more Indian blood, including minors of the same degree, shall not be subject to alienation or other incumbrance prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions wholly or in part. Section 2 of the act provides for leases of restricted lands for oil, gas or other mining purposes with the approval of the Secretary of the Interior. Section 9 of the same act provides that if any member of the Five Civilized Tribes shall die leaving issue surviving born since March 4, 1906, the homestead of such allottee shall remain inalienable until April 26, 1931, unless the restrictions against alienation are removed by the Secretary in the manner provided; but if such issue shall die before April 26, 1931, the land shall then descend to the heirs of the original allottee according to the law of descent free from all restrictions. Under these provisions where an allottee died leaving a child born after March 4, 1906, and other heirs, the subsequent approval by the Secretary of the Interior of an oil and gas lease executed by the heirs of the original allottee removed the restrictions on alienation from the leasehold and the royalties thereunder.

Parker v. Riley, 243 Federal, 42, p. 44.

INDIAN LANDS—LEASE AS ALIENATION—RESTRICTIONS REMOVED.

A lease of Indian lands valuable for oil and gas, granting the exclusive right to find and extract all the oil and gas therein, conveys only that part of the oil and gas which the lessee finds and reduces to possession, and not all the fugacious oil and gas in the land; but it nevertheless grants a right and gives the power to the lessee to extract and apply to his own use the most valuable part of the land of the lessor, the oil and gas in the ground; and when the execution of such a lease is followed by the discovery and extraction of valuable deposits of oil and gas thereunder, it not only conveys an incorporeal hereditament, but it effects the removal of the title to the most valuable part of the land of the lessors, as oil and gas in the ground is a part of the land of the owner, and such a lease becomes an alienation of that part of the land of the lessors, which the lessee takes from them, converts into personal property and appropriates to his own use. It follows that a lease of a restricted homestead for oil, gas or other mining purposes under section 2 of the act of May 27, 1908 (35 Stat., 312), is an alienation of that part of the land constituting the homestead which the lease permits the lessee to take from him by the discovery and removal therefrom of such oil, gas or other mineral therein.

Parker v. Riley, 243 Federal, 42, p. 47.

INDIAN LANDS—DESCENT—RIGHTS OF HEIRS.

A life tenant has no right to open mines and no right by virtue of the life estate to the royalties, rents, or profits from oil or gas obtained from mines subsequently opened; but the title to the oil and gas in the ground and the right to the rents, profits and royalties that may in the future be obtained from mines subsequently opened are in the owners of the fee. Under this rule the child of an Indian allottee born since March 4, 1906, has an estate for life in the allotment and this estate is not terminated or changed by the execution of an oil and gas lease approved by the Secretary of the Interior, but the royalties under such lease belong to the heirs to whom the land descended under the laws of the State.

Parker v. Riley, 243 Federal, 42, p. 48.

MINING PROPERTIES.

TAXATION.

INCOME TAX—DEPRECIATION OF MINE.

The word "depreciation" used in the income tax law of 1911 (Laws, 1911, ch. 658), is used in its ordinary and usual sense as understood by business men and means those amounts which business concerns usually charge off in the depreciation account for wear and tear and obsolescence of structures, machinery and personalty used in the business. It would be a strange use of the term to say that where ore is taken from a mine depreciation as generally understood in business circles follows. Evidently the ordinary depreciation of business structures and personalty was in the legislative mind when the act was passed and under the act there can be no deduction for depreciation in value of a mine by reason of taking out the ore.

Phister Land Co. v. City of Milwaukee (Wisconsin), 165 Northwestern, 23, p. 24.
See *Von Baumbach v. Sargent Land Co.*, 242 U. S., 503.

ROYALTIES SUBJECT TO INCOME TAX.

Royalties received under leases of mining property on the ore mined are rentals and though derived from sources without the state are subject to income taxation under the income tax act of 1911 (Laws, 1911, ch. 658), when received by a resident of the State.

Phister Land Co. v. City of Milwaukee (Wisconsin) 165 Northwestern, 23, p. 25.
See *Von Baumbach v. Sargent Land Co.* 242 U. S., 503.

MINERAL INTEREST TAXABLE.

The statute of North Dakota provides that real property for the purpose of taxation includes the land itself and all mines, minerals, and quarries therein. The purpose of the statute is to include any real property, everything which is connected therewith in its use and for which the ground itself is a constituent element. The statute undertakes to say what is defined as real estate but it does not say in whose name the same shall be assessed.

Northwestern Improvement Co. v. Oliver County (North Dakota), 164 Northwestern, 315, p. 318.

ASSESSMENT AND VALUATION.

The owner of certain lands conveyed the same "excepting and reserving unto the grantor, its successors and assigns forever all coal or iron upon or in said lands together with the use of such of

the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same." The interest conveyed and the interest reserved are separate and distinct and the interest retained necessarily detracts from the value of the land conveyed and such reservation must be assessed for taxes in the name of the grantor or the owner of the mineral right, where they have taxable value and the value of the mineral rights reserved is easily ascertainable. The payment of taxes by the grantee does not relieve the grantor from the duty of paying taxes on such reservations nor discharge the grantor's taxable obligations.

Northwestern Improvement Co. v. Oliver County (North Dakota), 164 Northwestern, 315, p. 318.

VALUATION OF MINERAL RIGHTS.

Where land has been conveyed with a reservation of all coal or iron and where no mines have been opened and no deposits of coal have been ascertained so as to be able to estimate the amount of mineral present in the land, the difference in the value of the land as sold with and without such reservation of the minerals would measure the value of the grantor's interest in the land. Where the amount of mineral in the land has been ascertained then the value of that mineral together with the value of the right to go upon the lands would be a fair measure of the grantor's interest as a valuation for the basis of taxation.

Northwestern Improvement Co. v. Oliver County (North Dakota), 164 Northwestern, 315, p. 319.

NET INCOME—HOLDING AND SUBSIDIARY CORPORATIONS.

Under the income tax law of 1913 (38 Stats. at Large, 114-166), a holding corporation can not be required to pay income tax on dividends received by it from the accumulated earnings of several subsidiary corporations, whose stock it held, where such accumulations were the undivided earnings of the subsidiary corporations for several preceding years. Such dividends can not be regarded as net income arising or accruing in the preceding calendar year within the meaning of the statute.

Gulf Oil Corporation v. Lewellyn, 242 Federal, 709, p. 713.

PRINCIPAL AND SUBSIDIARY CORPORATIONS.

An oil company as the principal corporation held the stock of several subsidiary companies. They were all engaged in a common enterprise, but the enterprise had several branches and the principal corporation and each subsidiary company attended to its own branch, though the principal corporation united and regulated its subsidiaries. Each company owned its own assets, carried on its own busi-

ness, owed its own debts, paid its own taxes, and enjoyed its own income. Under such circumstances the several companies are not in such relation to each other that the property, obligations, and liabilities of one can be regarded as the property, obligations, and liabilities of any other. Under the excise act of 1909 (36 Stats., 112), each was separately taxed in respect to its own business and under this act, the principal corporation did not include in its own returns the proceeds of the business done by the subsidiaries.

Lewellyn v. Gulf Oil Corp., 245 Federal, 1, p. 6.

Reversing Lewellyn v. Gulf Oil Corp., 242 Federal, 709.

SALE OF MINERALS—TAXATION AS OMITTED PROPERTY.

The owner of land by a proper instrument in writing conveyed for a valuable consideration the underlying coal in his land. The coal after its severance became property capable of definite ascertainment for the purpose of valuation for taxation and was properly added by the auditor of the county as omitted property.

Board, etc. Sullivan County v. Riggs (Indiana Appeals), 117 Northeastern, 214, p. 215.

SEVERANCE OF SURFACE AND MINERALS—DEPRECIATION IN VALUE.

Where the owner of lands conveys the minerals therein and thereunder by a written instrument and for a stated consideration, it is the duty of a county auditor when he enters the transfer to diminish the valuation of the surface of the land by the amount of the value of the minerals thus sold and conveyed.

Board, etc. Sullivan County v. Riggs (Indiana Appeals), 117 Northeastern, 214, p. 215.

STATE PRIVILEGE TAX.

The statute of Tennessee (Acts 1909, ch. 479, sec. 4), requires any person or corporation having oil depots, storage tanks, or warehouses for the purpose of selling, delivering, or distributing oil and any such person or corporation using a railroad car or railroad depots for such purposes shall pay a certain privilege tax. The privilege tax provided by this section can not be imposed on an Indiana oil refining company that shipped and consigned cars or tanks of oil to a purchaser at Mount Pleasant, Tenn., and where the cars or tanks were billed and were to be shipped to Columbia in the same State where a definite portion of the contents of each tank was to be taken out and delivered to the consignee at Columbia and the cars and tanks with the remainder of the contents should then proceed to Mount Pleasant. The transportation of the tanks destined to Mount Pleasant was not completed when it reached Columbia and the continuity of its movement was not broken by the temporary stop at Columbia.

Western Oil Refining Co. v. Lipscomb, 244 U. S., 346, p. 348.

LIENS.

EXPENSE OF ABATING NUISANCE—ARTESIAN WELLS.

The statute of New Mexico (secs. 265-268, Code, 1915) declares that an artesian well which is in such condition that water wastes therefrom is a public nuisance and authorizes its summary abatement by the artesian well supervisor. It also provides that the expense of the repairs or other work, including material or labor, shall become a lien on the land where such well is situated on proper notice to be given by the well supervisor. The lien imposed upon the land and well of the owner for the expense of repair or plugging is not upon the theory of benefit to the owner, but is taxed as the cost and expense of abating a nuisance and is within the legislative authority.

Eccles v. Ditto (New Mexico), 167 Pacific, 726, p. 728.

SCHOOL OF MINES.

CONTRACT FOR TEACHERS—INJUNCTION.

The application of taxpayers to prevent the trustees of the school of mines from carrying out an alleged contract entered into by three of such trustees in their individual capacity and not at a board meeting, to the effect that they would upon certain stated terms employ a third person as president of such school of mines, was denied where the application itself of the suit was to prevent the trustees of the school of mines from electing such person president of the school and where it was conceded that the contract of employment was void. It must be presumed that the trustees when convened in session as a board in accordance with law will properly discharge his duties.

Platt v. Carlton (Colorado), 168 Pacific, 1118.

QUARRY OPERATIONS.

PLEADING AND PROOF.

In an action for damages for injuries received by an employee in a quarry the plaintiff's allegation was that the operator's foreman who was in charge of the workmen gave a negligent order to some of the workmen to turn loose the cable. The proof showed, and the finding was to the effect, that no such order was given. This being the sole allegation of negligence and of the ground of recovery, the finding was necessarily fatal to the plaintiff's right of recovery.

Talley v. Harris Granite Quarries Co. (North Carolina), 93 Southeastern, 995, p. 997.

LIABILITY OF EMPLOYER.

An employee working in a quarry with other employees and injured by reason of the negligence of such coemployees can not recover from the quarry operator, as the operator is not liable to one employee injured through the negligence of his coemployees.

Talley v. Harris Granite Quarries Co. (North Carolina), 93 Southeastern, 995, p. 997.

LEASE—COVENANT TO REMOVE REFUSE.

Quantities of dirt from stripping, broken stone, riprap, and refuse had accumulated in a quarry from its operation at the time of the execution of a lease of the quarry. The lessee knew of such accumulations or refuse and that the removal thereof was necessary to properly operate the quarry. By the terms of the lease the lessee covenanted to cart all dirt accumulating from stripping and operating to a point designated and to remove all refuse, broken stone, riprap, and chimneys as they accumulated and to deposit them where they would not interfere with the future operations of the quarry. Under the known conditions and the terms of the lease the lessee assumed the burden of removing the accumulations and refuse at the time he covenanted to remove similar refuse accumulating from his own future operations. The fact that the lessee covenanted to yield up the premises in as good condition as when entered upon can not be held to release the lessee from the performance of the specific covenant to remove such accumulations and refuse.

East Sioux Falls Quarry Co. v. Wisconsin Granite Co. (South Dakota), 164 Northwestern, 77.

LEASE—COVENANT TO RETURN PREMISES IN EQUALLY GOOD
CONDITION.

A lease of a stone quarry requiring the lessee to yield up the premises in as good condition as when the same were when entered upon, loss by fire or inevitable accidents and ordinary wear are excepted. The lessee was not bound to restore the property absolutely in the condition he received it and if any of the property was in a worse condition from misuse or inattention than it was when he received it that depreciation would fall upon the lessee, but if the depreciation was from ordinary wear and tear, from ordinary use in a skillful manner in its operation in the business of quarrying or marketing stone, then the lessee would not be liable for any such loss or depreciation.

East Sioux Falls Quarry Co. v. Wisconsin Granite Co. (South Dakota), 164 Northwestern, 77.

ASSURANCE OF SAFETY BY OPERATOR—EQUAL KNOWLEDGE OF DANGER.

The rule that an employee may rely upon an assurance of safety made by an operator does not apply where the employee is an adult of ordinary intelligence, has had experience in the work, and has knowledge of the danger equal to that of the employer or operator. In such case his reliance upon an assurance of the absence of danger has no justification. The rule does not apply where the employee has an equal or a better knowledge of the danger than that possessed by his employer.

Grey Eagle Marble Co. v. Perry (Tennessee), 197 Southwestern, 674, p. 675.

ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.

An employee working in a quarry may rely upon assurances of safety and proceed with his work unless the danger was so plain that a person of ordinary prudence would see and appreciate it and refuse to take the risk. If the danger was so plain that a person of ordinary prudence would not take the risk, and the employee proceeded with the work with the knowledge of such danger, he must be held to have assumed the risk and can not recover for injuries sustained thereby.

Grey Eagle Marble Co. v. Perry (Tennessee), 197 Southwestern, 674.

DAMAGES FOR INJURIES TO MINERS.

ELEMENTS OF DAMAGES.

MATTERS PROPERLY CONSIDERED IN ESTIMATING DAMAGES.

In an action by a miner for damages for injuries caused by a fall of rock from the roof of the mine due to the alleged negligence of the mine operator, an instruction is not erroneous which authorizes the jury to take into account only the complainant's "crippled and maimed condition, and the nature and extent and duration thereof, the physical and mental pain he has suffered by reason of his said injury, the length of time he was confined to his bed or room, unable to work by reason of such injuries, the diminution, if any, of his earning capacity, and the probable duration of his life."

Peacock Coal Min. Co. v. Crawford (Indiana Appeals), 117 *Northeastern*, 504, p. 506.

RIGHT TO RECOVER PUNITIVE DAMAGES.

Under an ordinary complaint for damages for injuries to a miner caused by the negligence of the mine operator, it is error for a court to instruct the jury that the plaintiff is entitled to recover both compensatory and punitive damages. But it is harmless where the court immediately corrected the error.

Empire Coal Co. v. Goodhue (Alabama), 76 *Southern*, 31, p. 32.

RECOVERY OF PUNITIVE DAMAGES.

Under a complaint charging a defective condition of the roof of a mine resulting proximately in injuries to the complainant, and averring that the defendant "grossly and wantonly and recklessly permitted the roof to remain in said defective condition, and plaintiff was proximately injured from said gross and wanton negligence," a jury may award the complainant, in addition to compensatory damages, such damages as in their discretion they see fit to punish the defendant for such action and to deter others in like business from such wrongdoing in the future.

Clinton Min. Co. v. Bradford (Alabama), 76 *Southern*, 74, p. 79.

PROOF OF STATEMENT OF CONDITION TO PHYSICIAN.

A physician has a right to obtain a history of the patient's case and to form an opinion therefrom which he may give in his testimony in an action by the injured person, and in such action the physician may give his opinion as to the injured person's present condition

and as to the probable cause thereof, and this may be based upon what the injured person stated to the physician when he was examined by him long after the accident and with a view of giving his testimony in the case. But an injured person may not make statements to a physician favorable to his case and upon the trial introduce the physician to prove such self-serving statements; but this rule does not prevent the physician from giving his opinion as to the condition of the injured person and the cause of it.

Stearns Coal & Lumber Co. v. Williams (Kentucky), 198 Southwestern, 54, p. 55.

MORTALITY TABLES AS EVIDENCE.

In an action by a miner for damages for injuries, mortality tables are competent for the purpose of showing the probable length of life of a given person and are merely an aid to the jury, but they are not conclusive. In such a case, the court may properly instruct the jury to the effect that in estimating the loss of the miner's earning capacity they may consider his life expectancy "based on the evidence" and such an instruction is not rendered erroneous by the addition of the words "and upon your own experience and knowledge as to such matters."

Cnkovch v. Success Min. Co. (Idaho), 166 Pacific, 567, p. 570.

DAMAGES NOT EXCESSIVE.

DAMAGES NOT EXCESSIVE—INSTANCES.

In an action by a miner for injuries received while working in a mine, a judgment for \$7,500 is not excessive where it appeared that the miner was 31 years of age, experienced in mining, and was at the time of his injury earning \$3.50 per day, with a life expectancy of 34 years; and where the evidence showed that the injury was permanent and that the miner would never be able to do any labor which required any exercise whatever.

Cnkovch v. Success Min. Co. (Idaho), 166 Pacific, 567, p. 571.

WATER RIGHTS.

APPROPRIATION OF WATER—ABANDONMENT.

The statute of Oregon (sec. 6546 L. O. L.) provides that the right to appropriate water for irrigation and domestic purposes may be abandoned by failure to use such water for a period of one year. But this act does not apply to the taking of water for the purpose of developing the mineral resources of the State and furnishing electrical power. Sec. 6571 fixes the period of nonuser for developing mining and electrical power at two years. The two acts treat of different subjects and each provides its own limit of nonuser as a ground of forfeiture. On abandonment under either statute the water reverts to the public and is subject to other appropriation in order of priority.

Waters of Umatilla River, In re (Oregon), 168 Pacific, 922, p. 924.

CONTRACT TO SUPPLY WATER—CONSTRUCTION—LIABILITY.

A contract entered into between a water-supply company and a coal-mining company provided that the water company was to furnish the coal company 250,000 gallons of water a day at 5 cents a thousand gallons. The contract further provided that if the quantity of water furnished at the meter should not in any one year at the rate of 5 cents per thousand gallons amount to \$900 or more, the coal company should nevertheless pay to the water company the sum of \$900 for each and every year in which the quantity of water should not equal or exceed the sum of \$900. There is no provision in the contract by which the coal company obligates itself to receive the 250,000 gallons of water per day. This contract does not compel the coal company to receive 250,000 gallons of water per day and it can not be compelled to pay for that amount of water, where there is nothing in the contract that compels the water company to furnish that number of gallons of water per day. Under the terms of the contract the amount which the coal company obligated itself to receive was to be measured by the minimum rental of \$900 per year.

Mountain City Water Co. v. Harleigh-Brookwood Coal Co. (Pennsylvania), 101 Atlantic, 734.

RIGHT TO DRAIN WATER ON LANDS OF OTHERS.

The owner of land adjoining a quarry can not enjoin the owner of the quarry from draining the same and from pumping water from his quarry into a drain through and across the land of the complainant where it appears that for a valuable consideration the quarry owner obtained the right or easement from a prior owner and had expended a large sum of money in putting in a drain and where it also appears that at the time when the quarry owner was preparing to drain the water in a different direction he was requested by the former owner of the land to make the drain across his land, which was the natural water shed, and gave the land owner the privilege of connecting with and using the drain.

Gerard v. Lehigh Stone Co. (Illinois), 117 Northeastern, 698, p. 699.

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INTERSTATE COMMERCE.

STATE REGULATION—FREIGHT RATES.

The constitution of Missouri (sec. 12, Art. XII), provides that it shall not be lawful for any railway company to charge a greater amount for the transportation of freight or passengers for a less distance than an amount charged for any greater distance with certain stated exceptions. This section prohibits a railroad company from charging for the shipment of coal in respect of intrastate commerce more for a shorter haul than for a longer one over any portion of its line within the State without regard to direction, circumstances, or conditions. A coal company that has been compelled to pay freight at a rate greater for a short than for a long haul has an absolute right to recover any overcharge so paid.

Missouri Pacific R. Co. v. McGrew Coal Co., 244 U. S., 191, p. 199.

REGULATION BY STATE ACTION.

Interstate commerce consisting of the transportation, sale, and distribution of natural gas is not of a local nature in the State in which it is sold and distributed and is not, even in the absence of action by Congress, subject to burdens or regulations imposed by State action, which are substantial rather than incidental in their nature. A statute or the order of a public-utilities commission fixing a price at which gas, transported from another State, may be sold to the ultimate consumer is in fact a fixing of rates for the transportation of the gas and is a direct burden upon and a direct attempt to regulate interstate commerce.

Landon v. Public Utilities Commission of Kansas, 242 Federal, 658, p. 689.

SHIPMENT OF COAL—INTERSTATE AND INTRASTATE FREIGHT RATES.

Cars of coal were delivered by a coal-mining company to a railroad company for shipment in the usual and ordinary way without any direction or request by the coal-mining company as to what particular trains were to haul the cars. The railroad company received and hauled such cars of coal in the usual and ordinary course of its business on the usual trains passing over its road. The trains that hauled the company's cars of coal to points within the same State received and hauled other cars and shipments consigned from points within such State to points without the State, and received cars from points without the State to points within the State, and cars from points without the State through the State to points in other

States. These facts do not justify the railroad company under the constitution of Missouri (sec. 12, Art. XII) in charging a greater freight rate for a short distance than for a greater distance.

Missouri Pacific R. Co. v. McGrew Coal Co., 244 U. S., 191, p. 196.

INTER AND INTRASTATE SHIPMENT—DETERMINATION.

The question whether particular commerce is interstate or intrastate is ordinarily determined by what is actually done and not by any mere billing or plurality of carriers; and where cars or tanks of oil are in fact destined from one State to another, rebilling or reshipping en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. It is the essential character of the commerce, not the extent of local or other bills of lading.

Western Oil Refining Co. v. Lipscomb, 244 U. S., 346, p. 349.

CONTINUOUS SHIPMENT—RESHIPMENT IN STATE OF CONSIGNMENT.

A car or tank of oil was shipped by an oil-refining company in Indiana to its consignee in the State of Tennessee. The car was billed to the consignee at a particular point or station for the convenience of the consignee; a part of the contents of the car was there removed by the consignee and the car then rebilled to the consignee to another shipping point. This method was adopted because the carrier refused to permit any stop-over privileges on the oil tanks; but the intention of the parties was that the shipment should go to the consignee at the last shipping point named. The transportation of the merchandise destined to the latter shipping point was not completed when it reached the first point named nor was the continuity of its movement broken by its temporary stop at such first-named place. The journey to the first-named place and the journey from there to the second-named place were not independent each of the other, but in fact and in legal contemplation were connected parts of a continued interstate movement to the latter place. Under such circumstances a State privilege tax can not be imposed for the shipment from the first named point to the second.

Western Oil Refining Co. v. Lipscomb, 244 U. S., 346, p. 349.

PRODUCTION, TRANSPORTATION, AND DISTRIBUTION OF NATURAL GAS.

A corporation engaged in producing gas from wells in Oklahoma and Kansas and transporting it from such wells through pipe lines beginning in Oklahoma and entering the State of Kansas, at which point gas is first distributed and sold to consumers, and is then transported through pipe lines conveying gas from the wells in Oklahoma and Kansas, on through the latter State, with sales and distribution

at different points, the pipe lines and transportation extending on into the State of Missouri, where it is sold to other consumers, is engaged in interstate commerce. The fact that the gas brought from Oklahoma in the pipe lines can not be distinguished from the gas produced and entering the pipe lines in Kansas and that distribution and sales of such mingled gas in the State of Kansas does not destroy the interstate commerce character of the transaction, and the character of the business inheres from the beginning of the journey in Oklahoma to the termination thereof at the burner tips.

Landon v. Public Utilities Commission of Kansas, 242 Federal, 658, p. 681.

St. Joseph Gas Co. v. Barker, 243 Federal, 206, p. 212.

ELEMENTS AS APPLIED TO NATURAL GAS.

Interstate commerce as applied to natural gas begins when the gas is delivered to the carrying company for transit from a point in one State to a point in another State or is actually started on its ultimate passage. Interstate commerce in natural gas ends when the shipment reaches its intended destination. A change of carriers or plurality of carriers does not affect the status of the interstate shipment. Change of ownership of the gas during transit does not necessarily affect the status of the shipment. Employment of an agent at the point of destination to effect delivery to the ultimate consumer does not destroy the character of the shipment. The time and place at which the title to the gas passes as between seller and consumer is not controlling upon the character of the shipment. The parties, shipper, carrier, and consumer, may be three separate parties or a less number. The absence of a specific consignee at the time and place the transportation is started does not alter the character of the shipment. The exact destination of the gas need not be fixed at the time the transportation is commenced, if the intent and purpose is to continue the transportation beyond the limits of the State in which it begins. The fact that the transportation is started before a definite order for a specified amount is given is immaterial, as the continual and usual course of business determines the character of the shipment.

Landon v. Public Utilities Commission of Kansas, 242 Federal, 658, p. 683.

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